LEEDS POLYTECHNIC
LIBRARY

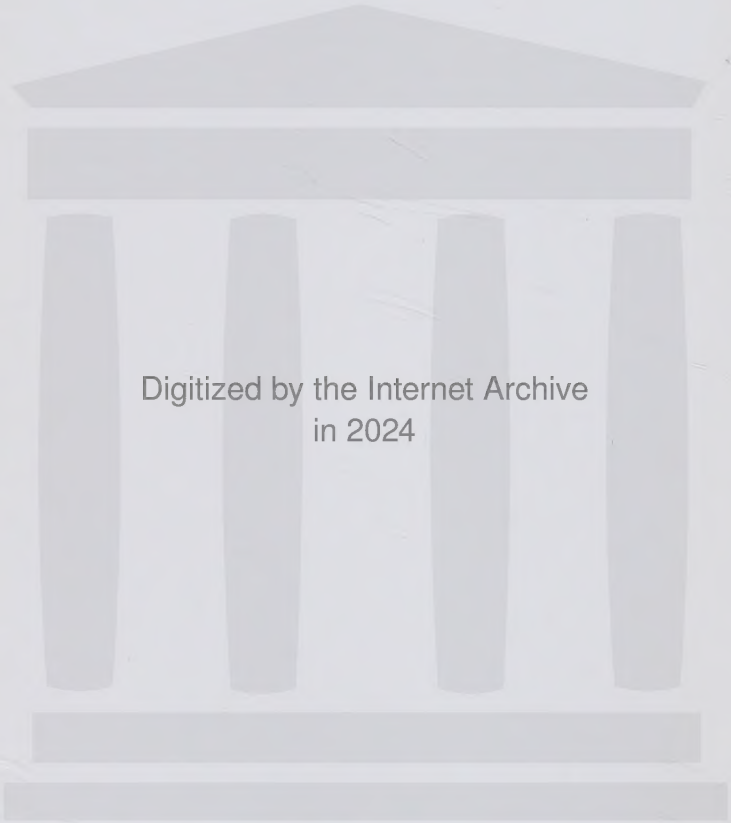
LEEDS POLYTECHNIC
LIBRARY

FOR REFERENCE USE IN
THE LIBRARY ONLY.

FOR REFERENCE USE IN
THE LIBRARY ONLY.

LEEDS BECKETT UNIVERSITY
LIBRARY
DISCARDED
71 0283757 8

TELEFEN



Digitized by the Internet Archive
in 2024

https://archive.org/details/lawreportskingsb0002unse_d7n8

THE LAW REPORTS

[1915] 2 King's Bench

ISBN 0 406 09304 0

This compilation

© The Incorporated Council of Law Reporting
for England and Wales
and
Butterworth & Co. (Publishers) Ltd.
1974

Reprinted by photolitho in Great Britain by
Compton Printing Ltd., London and Aylesbury

This Reprint of
THE LAW REPORTS
is published in collaboration with
THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES
by
BUTTERWORTH & CO. (PUBLISHERS) LTD.
88 KINGSWAY
LONDON WC2B 6AB

NOTE. This Reprint is a photographic reproduction of the original volume apart from the Tables of Cases, Statutes and Statutory Instruments and the Subject Index, which are omitted in view of the facilities provided by modern text books and other works of reference

1915.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	W. J. BROOKS, W. F. BARRY,	*Barristers-at-Law.*
King's Bench, Court of Criminal Appeal; Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases	J. F. CLERK, F. O. ROBINSON, J. E. ALDOUS, W. H. GRIFFITH, J. H. WILLIAMS, J. S. HENDERSON,	*Barristers-at-Law.*
Bankruptcy Cases	H. L. FRASER,	*Barrister-at-Law.*

1915.—VOL. II.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

710 283757-8

LEEDS POLYTECHNIC
221643
SL
72A15

JUDGES

OF

THE COURT OF APPEAL.

1915.

Viscount Haldane, Lord Buckmaster,	Lords Chancellor.
Lord Reading, Lord Chief Justice of England.	
Lord Cozens-Hardy, Master of the Rolls.	
Sir H. B. Buckley (now Baron Wrenbury), Sir W. R. Kennedy, Sir C. Swinfen Eady, Sir W. G. F. Phillimore, Sir W. Pickford, Sir J. Eldon Bankes, Sir T. Rolls Warrington,	Lords Justices of the Court of Appeal.
Sir Samuel T. Evans,	President of the Probate, Divorce, and Admiralty Division.

JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1915.

Lord Reading, Lord Chief Justice of England, President.
Sir Edward Ridley, Knt.
Sir Charles John Darling, Knt.
Sir Reginald More Bray, Knt.
Sir Alfred Tristram Lawrence, Knt.
Lord Coleridge.
Sir Thomas Edward Scrutton, Knt.
Sir Horace Edmund Avory, Knt.
Sir Thomas Gardner Horridge, Knt.
Sir Charles Montague Lush, Knt.
Sir Sidney Arthur Taylor Rowlatt, Knt.
Sir Clement Meacher Bailhache, Knt.
Sir James Richard Atkin, Knt.
Sir Montague Shearman, Knt.
Sir John Sankey, Knt.
Sir Frederick Low, Knt.

ATTORNEYS-GENERAL:

Sir J. A. Simon, Knt.
Sir E. H. Carson, Knt.

SOLICITORS-GENERAL:

Sir S. O. Buckmaster, Knt.
Sir F. E. Smith, Knt.

ERRATA.

Page	*Line*	*For*	*Read*
5	19 from top	A. Cohen	A. Cohn
45	footnote (4)	add reference to 7 E. & B. 872	
52	17 from top	Montgomery, K.C.	Montgomery, K.C., and Bruce Williamson
294	12 from bottom	delete comma after "plaintiff"	
294	11 from bottom	after "damages" add "the defendant"	

[1915] 1 K. B.

922	2 from bottom	free of capture	against the risks of capture

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1915, will be as follows :—

In the First Series,
[1915] 1 Ch. [1915] 2 Ch.

In the Second Series,
[1915] 1 K. B. [1915] 2 K. B. [1915] 3 K. B. [1915] P.

In the Third Series,
[1915] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Abercarn Black Vein Steam Coal Company, Barwell *v.* (C. A.)	256
Allwood, Winterbottom *v.*	608
Amendt, Rex *v.* (C. A.)	276
———, ——— *v.*	593
Amphlett (Judge), Rex *v.*	223
Ashton, Associated Portland Cement Manufacturers (1910) *v.* (C. A.)	1
Assets (London and Counties) Company *v.* Brighton Grand Concert Hall and Picture Palace (C. A.)	493
Associated Portland Cement Manufacturers (1910) *v.* Ashton (C. A.)	1
Atkinson *v.* Shaw	768
Aykroyd, Lee *v.*	692

B.

Barnard *v.* Foster	288
Barwell *v.* Abercarn Black Vein Steam Coal Company (C. A)	256
Birkenhead Corporation, Mersey Docks and Harbour Board *v.*	312
Blackett *v.* Ridout (C. A.)	415
Blythe, Green, Jourdain & Co., Karberg (Arnhold) & Co. *v.*	379
Brighton Grand Concert Hall and Picture Palace, London and Counties Assets Company *v.* (C. A.)	493
British and Chilian Steamship Company, Thames and Mersey Marine Insurance Company *v.*	214
British and Foreign Marine Insurance Company, Sanday & Co. *v.* (C. A.)	781
British Dominions General Insurance Company *v.* Duder (C. A.)	394
British India Steam Navigation Company, Ciampa *v.*	774
Brown, Dixon *v.*	294
Burgett & Newsam, Schneider (Theodor) & Co. *v.*	379

C.

Carill-Worsley, In re	534
Carpathian (Owners of), Liston *v.*	42

PAGE

Chadwick, Jibb *v.* (C. A.) 94
Chuter *v.* Ford (J. J.) & Sons (C. A.) 113
Ciampa *v.* British India Steam Navigation Company 774
Clare & Co. *v.* Dresdner Bank 576
Coaching and Carriage (Llandudno) Company, Williams *v.* (C. A.) 101
Coal and Coke (Westminster Brymbo) Company, Price *v.* (C. A.) 128
Coal and Iron (Florence) Company, Fairbanks *v.* (C. A.) 714
Coal (Gas) Collieries, Date *v.* (C. A.) 454
Coote & Richards, Ex parte. In re Gershon and Levy 527
Cross, Ellis & Co. *v.* 654
Cupper, Reid *v.* (C. A.) 147

D.

Date *v.* Gas Coal Collieries (C. A.) 454
Dixon *v.* Brown 294
Docks and Harbour (Mersey) Board *v.* Birkenhead Corporation 312
Dresdner Bank, Clare & Co. *v.* 576
Duder, British Dominions General Insurance Company *v.* (C. A.) 394

E.

East Ham Corporation, Stratford Co-operative Society *v.* 70
Electric Theatres (London and Provincial), Ex parte. Rex *v.* London County Council (C. A.) 466
Ellis *v.* North Metropolitan Theatres 61
—— & Co. *v.* Cross 654

F.

PAGE

Fairbanks *v.* Florence Coal and Iron Company (C. A.) 714
Florence Coal and Iron Company, Fairbanks *v.* (C. A.) 714
Flude *v.* Goldberg 157
Ford (J. J.) & Sons, Chuter *v.* (C. A.) 113
Foster, Barnard *v.* 288
Fox (Samuel) & Co., Herbert *v.* (C. A.) 81

G.

Gas Coal Collieries, Date *v.* (C. A.) 454
Gentle, Young *v.* 661
Gershon and Levy, In re. Ex parte Coote & Richards. Ex parte Westcott & Sons 527
Gledhill, Theatre de Luxe (Halifax) *v.* 49
Goby *v.* Wetherill 674
Gold Mining (Komata Reefs) Company, Ziman *v.* (C. A.) 163
Goldberg, Flude *v.* 157
Grubb, Rex *v.* (C. C. A.) 683
Guaranty Trust Company of New York *v.* Hannay & Co. (C. A.) 536
Gunyon *v.* South Eastern and Chatham Railway Companies' Managing Committee 370

H.

Halifax Corporation, Shaw *v.* (C. A.) 170
Hannay & Co., Guaranty Trust Company of New York *v.* (C. A.) 536
Harris *v.* Taylor (C. A.) 580
Herbert *v.* Fox (Samuel) & Co. (C. A.) 81
Hewitt Brothers *v.* Wilson (C. A.) 739
Hopper, Rex *v.* (C. C. A.) 431
Hull and Barnsley Railway Company, Pyman Steamship Company *v.* (C. A.) 729

I.

PAGE

Inland Revenue Commissioners *v.* St. John's College, Oxford 621

——— *v.* Whidborne's Executors 350

Insurance (British Dominions General) Company *v.* Duder (C. A.) 394

J.

Jacobs & Co., Meade-King, Robinson & Co. *v.* (C. A.) 640

Jeffery, Perkins *v.* 702

Jibb *v.* Chadwick (C. A.) 94

Jones, London and North Western Railway Company *v.* 35

K.

Karberg (Arnhold) & Co. *v.* Blythe, Green, Jourdain & Co. 379

Komata Reefs Gold Mining Company, Ziman *v.* (C. A.) 163

Kupfer, Rex *v.* (C. C. A.) 321

Kurasch, Rex *v.* (C. C. A.) 749

L.

Lee *v.* Aykroyd 692

Linthwaite Urban Council, West Riding of Yorkshire Rivers Board *v.* (C. A.) 436

Liston *v.* Carpathian (Owners of) 42

Llandudno Coaching and Carriage Company, Williams *v.* (C. A.) 101

London and Counties Assets Company *v.* Brighton Grand Concert Hall and Picture Palace (C. A.) 493

London and North Western Railway Company *v.* Jones 35

PAGE

London and Provincial Electric Theatres, Ex parte. Rex *v.* London County Council (C. A.) 466

London, Brighton and South Coast Railway Company, Metropolitan Water Board *v.* (C. A.) 297

London County Council *v.* Perry 193

———, Rex *v.* Ex parte London and Provincial Electric Theatres (C. A.) 466

———, Whittaker *v* 676

M.

Marine Insurance (British and Foreign) Company, Sanday & Co. *v.* (C. A.) 781

Marine Insurance (Thames and Mersey) Company *v.* British and Chilian Steamship Company 214

Maritime (Owners of S.S.), Williams *v.* (C. A.) 137

Meade-King, Robinson & Co. *v.* Jacobs & Co. (C. A.) 640

Mersey Docks and Harbour Board *v.* Birkenhead Corporation 312

Metropolitan Water Board *v.* London, Brighton and South Coast Railway Company (C. A.) 297

Mitsui *v.* Mumford 27

Morpeth Corporation and Stoker, In re (C. A.) 511

Moser, Ex parte 698

Mumford, Mitsui *v.* 27

N.

North Metropolitan Theatres, Ellis *v.* 61

O.

Oppenheimer and Colbeck, Rex *v.* (C. C. A.) 755

P.

PAGE

Paddington Union *v.* Westminster Union 644
Perkins *v.* Jeffery 702
Perry, London County Council *v.* 193
Portland Cement (Associated) Manufacturers (1910) *v.* Ashton (C. A.) 1
Price *v.* Westminster Brymbo Coal and Coke Company (C. A.) 128
Procter *v.* Tarry (C. A.) 242
Pyman Steamship Company *v.* Hull and Barnsley Railway Company (C. A.) 729

R.

Reid *v.* Cupper (C. A.) 147
Rex *v.* Amendt (C. A.) 276
—— *v.* —— 593
—— *v.* Amphlett (Judge) 223
—— *v.* Evans (C. C. A.) 762
—— *v.* Grubb (C. C. A.) 683
—— *v.* Hopper (C. C. A.) 431
—— *v.* Kupfer (C. C. A.) 321
—— *v.* Kurasch (C. C. A.) 749
—— *v.* London County Council. Ex parte London and Provincial Electric Theatres (C. A.) 466
—— *v.* Oppenheimer and Colbeck (C. C. A.) 755
—— *v.* Robinson (C. C. A.) 342
—— *v.* Taylor 593
—— *v.* —— (C. C. A.) 709
Reynolds, In re. Ex parte White Brothers (C. A.) 186
Ridout, Blackett *v.* (C. A.) 415
Robinson, Rex *v.* (C. C. A.) 342

S.

St. John's College, Oxford, Inland Revenue Commissioners *v.* 621
Sanday & Co. *v.* British and Foreign Marine Insurance Company (C. A.) 781

PAGE

Schneider (Theodor) & Co. *v.* Burgett & Newsam 379
Shaw *v.* Halifax Corporation (C. A.) 170
Silber, In re (C. A.) 317
South Eastern and Chatham Railway Companies' Managing Committee, Gunyon *v.* 370
Steam Coal (Abercarn Black Vein) Company, Barwell *v.* (C. A.) 256
Steam Navigation (British India) Company, Ciampa *v.* 774
Steamship (British and Chilian) Company, Thames and Mersey Marine Insurance Company *v.* 214
Steamship (Pyman) Company *v.* Hull and Barnsley Railway Company (C. A.) 729
Stoker and Morpeth Corporation, In re (C. A.) 511
Stratford Co-operative Society *v.* East Ham Corporation 70

T.

Tarry, Procter *v.* (C. A.) 242
Taylor, Harris *v.* (C. A.) 580
——, Rex *v.* 593
——, —— *v.* (C. C. A.) 709
Thames and Mersey Marine Insurance Company *v.* British and Chilian Steamship Company 214
Theatre de Luxe (Halifax) *v.* Gledhill 49
Trust (Guaranty) Company of New York *v.* Hannay & Co. (C. A.) 536

W.

Water (Metropolitan) Board *v.* London, Brighton and South Coast Railway Company (C. A.) 297

	PAGE
West Riding of Yorkshire Rivers Board *v.* Linthwaite Urban Council (C. A.)	436
Westcott & Sons, Ex parte. In re Gershon and Levy	527
Westminster Brymbo Coal and Coke Company, Price *v.* (C. A.)	128
Westminster Union, Paddington Union *v.*	644
Wetherill, Goby *v.*	674
Whidborne's Executors, Inland Revenue Commissioners *v.*	350
White Brothers, Ex parte. In re Reynolds (C. A.)	186
Whittaker *v.* London County Council	676
Williams *v.* Llandudno Coaching and Carriage Company (C. A.)	101
——— *v.* Maritime (Owners of S.S.) (C. A.)	137
Wilson, Hewitt Brothers *v.* (C. A.)	739
Winterbottom *v.* Allwood	608
Y.	
Young *v.* Gentle	661
Z.	
Ziman *v.* Komata Reefs Gold Mining Company (C. A.)	163

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1914
Dec. 15, 16, 18.

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED *v.* ASHTON.

Ship—Sailing Barge — Owner — Master — System of "Thirds"—Charter-party—Bill of Lading—Contract with Master—Undisclosed Principal—Loss of Cargo—Liability of Owner.

The plaintiffs chartered a barge, the *Myrtle*, for the carriage of a cargo of cement, which was lost through the sinking of the barge consequent upon her unseaworthiness. The barge was being worked on the system of "thirds," under which the master, Cole, took two-thirds of the gross freights, paying thereout the mate, crew, cost of provisions, and the expenses of the voyage, and handing over one-third of the gross freights, less harbour and towage dues and brokerage, to the defendant, the owner, who provided the barge and paid for her

C. A.

1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED *v.* ASHTON.

upkeep. Neither the charterparty nor the bill of lading contained any reference to the owner. Cole, described only as "of the good ship the *Myrtle*," signed the charterparty, but not as "master" or "for the owner," and in the bill of lading, which he signed as "E. Cole," he was referred to as "the master of the said ship."

In an action by the plaintiffs against the defendant to recover the amount of the lost cargo, the defendant denied liability on the ground that the contract was with the master, and that there was nothing to show that he was agent of, or servant for, an undisclosed principal.

It appeared from the evidence that Cole usually arranged the chartering; that he was appointed by the defendant to work and sail the ship; and that he was not dismissable during the continuance of the voyage except for grave misconduct:—

Held, that upon the true inference to be drawn from the facts as proved, there was no demise or bailment of the ship to the master; that he managed and sailed the ship for the joint benefit of himself and the owner whose servant or agent he was; and that the owner was liable on the contract.

Decision of Pickford J. on this point (post, p. 3) reversed.

Steel v. *Lester* (1877) 3 C. P. D. 121 approved.

Bernard v. *Aaron* (1863) 9 Jur. (N.S.) 470; 31 L. J. (C.P.) 334, distinguished.

The critical test in all such cases is: Where does the real control rest? By retaining control over the master the owner retains control also over the ship, and in that event it is immaterial whether he receives a share of the gross freights or the net profit.

Decisions under the Workmen's Compensation Acts upon the existence or otherwise of the relationship of employer and workman between the owner and master of the ship are of little assistance in determining whether the master of a ship is the agent of the owner for the management thereof.

Boon v. *Quance* (1909) 3 B. W. C. C. 106 distinguished.

APPEAL from a judgment of Pickford J. in an action by the plaintiffs to recover the amount of the loss of a cargo of cement shipped at Northfleet on board a barge called the *Myrtle*, owned by the defendant, for carriage to Fowey. The cargo was lost through the sinking of the *Myrtle* in calm weather in the Channel.

The *Myrtle* was being worked on the "thirds" system, the master, Cole, taking two-thirds of the gross freights, paying thereout the mate and the crew and the cost of the provisions and the expenses of the voyage, and handing over one-third of the gross freights, less harbour and towage dues and brokerage, to the owner, who provided the ship and paid for her upkeep.

By the charterparty, Cole, described only as "of the good ship or vessel called the *Myrtle*," chartered her to the plaintiffs to convey cement from the charterers' wharf in the Thames to Fowey at certain rates of freight subject to the conditions therein contained. The bill of lading, which incorporated the conditions of the charterparty, after the statement of the particulars concluded as follows:— "In witness whereof the master of the said ship hath affirmed, to one bill of lading," and then followed the signature "E. Cole." Neither document contained any reference to the owner.

The evidence at the trial concerning the relationship between the owner and the master was lengthy, and the result of it appears in the judgments of the Court of Appeal set out below. The defendant Ashton, who was ill, did not give evidence, but his co-owner, Smith, was called as a witness. He stated that he became part owner of the *Myrtle* in 1901, but that Ashton was the managing owner; and for the purposes of the trial and this appeal the defendant Ashton was treated as the owner, and it was admitted that he was the owner and Cole the master.

By their claim the plaintiffs alleged that the loss of the barge and cargo was due to her unseaworthiness when she sailed. This the defendant denied, and alleged that the condition of the *Myrtle* was due to the defective or dangerous nature of the loading berth to which she was invited or ordered by the plaintiffs, and he counterclaimed for damages accordingly. At the trial Pickford J. found both these issues in favour of the plaintiffs.

A third issue was raised by the plaintiffs at the trial, namely, that there was a contract between them and the defendant owner. This the defendant denied, and contended that the only contract was with Cole, and that there was nothing to show that the latter was agent for, or servant of, an undisclosed principal. Pickford J., considering himself bound by the decision in *Bernard* v. *Aaron* (1), found this third issue in favour of the defendant, for whom judgment was entered accordingly. The judgment upon this issue was as follows:—

1914. Feb. 3. PICKFORD J. I find it impossible to distinguish the facts of the employment in this case from the facts of the

(1) 9 Jur. (N.S.) 470.

1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Pickford J.

employment in *Bernard* v. *Aaron*. (1) The facts seem to be really identical, the only difference being that it is said here in so many words that the owner paid for the upkeep of his vessel, whereas it is not said so in so many words in *Bernard* v. *Aaron* (1); but I should think that that was the case there also. I cannot draw any distinction between the facts of the two cases, and I find it very difficult to draw any distinction between this case and the case of *Steel* v. *Lester* (2), because, although it is a fact that there the participation was in net profits, which, of course, is prima facie evidence of a partnership, whereas participation in gross profits is not, the learned judges do not seem to me to have laid any stress on that in delivering their judgments, and the only thing to distinguish this case from *Bernard* v. *Aaron* (1) is that that was an action of tort and that this is an action of contract.

It is said that the owner holds out the master as being authorized to contract for the owner. That does not seem to me to be consistent with the judgment in *Bernard* v. *Aaron*. (1) No doubt Byles J. did say that he reserved the question as to whether the defendant was responsible in an action ex contractu: but the real basis of the judgment is the one stated very shortly by Keating J., that the result of the facts in the case is that Aaron was not the agent of Sharpley, but the hirer of the vessel, and Willes J., I think, uses the same expression. He says he is not the agent of the owner, but the person who works the vessel on his own account. Byles J. also says: "I think Aaron is the hirer of the ship, paying for the hire of it by uncertain amounts."

Now if he is the hirer of the ship I do not see that there is any holding out of him as the agent of the owner. I do not express any opinion as to whether the principle of *Bernard* v. *Aaron* (1) is right or is reconcilable with the other authorities that have been cited. I think it is an authority so much on all fours with the present case that I am bound to act upon it.

It is not mentioned at all by Scrutton J. in his book on Charterparties and Bills of Lading, and it is only mentioned very casually in Mr. Carver's book on Carriage by Sea, and mentioned in a way that leads me to think that Mr. Carver

(1) 9 Jur. (N.S.) 470. (2) 3 C. P. D. 121.

thought that it was in conflict with the current authorities. But I find it so much on all fours with this case that I do not feel myself justified in considering what I should decide apart from it, and upon that ground I think the defendant is entitled to judgment.

It would be very satisfactory, I think, if the matter is cleared up by some Court which can disregard *Bernard* v. *Aaron* (1) if it thinks fit. I do not say it ought to do so. I do not think I am at liberty to disregard that decision, and therefore I say there must be judgment for the defendant on that ground.

From this judgment the plaintiffs appealed. The defendant also appealed from the finding of the learned judge against his counterclaim that the vessel had been damaged owing to the defective or dangerous nature of the loading berth. During the hearing of the appeal the Court unanimously affirmed the findings of Pickford J. upon the first and second issues above mentioned, and the plaintiffs' appeal upon the third issue is alone material for the purposes of this report.

Compston, *K.C.*, and *A. Cohen*, for the appellants. The defendant does not admit that the contract was made by him; and the learned judge held that the arrangement between the defendant, the owner of the ship, and the master amounted in fact to a lease of her to the latter, and that in signing the contract he was acting for himself as principal. The appellants submit that that decision is wrong; the arrangement was merely for the working of the ship and the defendant is liable: *Dry* v. *Boswell* (2); *Frazer* v. *March*. (3) It is not suggested that the plaintiffs knew of any arrangement which could alter the liability of the owner, and they were justified in assuming that the master was not the owner: *Colvin* v. *Newberry*. (4)

The bill of lading and the charterparty preserve the distinction between the owner and the master. As between the shipper of goods and the shipowner a liability may be established where that relationship is found to exist: *Baumwoll Manufactur* v.

(1) 9 Jur. (N.S.) 470.
(2) (1808) 1 Camp. 329.
(3) (1811) 13 East, 238.
(4) (1832) 1 Cl. & F. 283.

C. A. 1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Furness. (1) The shipper of goods is entitled to consider the master as the agent of the owner: *Manchester Trust* v. *Furness.* (2) The burden of proof is on the defendant, and he has not shown any arrangement which took this ship out of his control; the master could be dismissed, and nothing like a lease is made out.

Bernard v. *Aaron* (3) was an action of tort and turned on special facts, and is entirely distinguishable from this case. The facts here show that there was no demise or hiring of the ship and that the master contracted as the agent or servant of the owner: *Steel* v. *Lester* (4); *Manchester Trust* v. *Furness.* (2)

Adair Roche, K.C., and *C. Robertson Dunlop*, for the respondent. The bill of lading in this case incorporated the conditions of the charterparty, and Cole, the master, is prima facie the contracting party. It is for the appellants to show that he was acting for an undisclosed principal: notes on *Thomson* v. *Davenport* (5) in Smith's Leading Cases, vol. ii., 11th ed., p. 390; *Thomas* v. *Edwards.* (6) The contract is between the appellants and Cole "of the good ship or vessel called the *Myrtle*," and is signed by him simply as Cole. In *Steel* v. *Lester* (4), however, the master signed the charterparty as master "for and on behalf of the owner." That case is widely different on the facts from this case, and there the owner took a share of the net profits, whereas here he took a share of the gross freights.

There was a demise or hiring of this vessel by Cole, and the learned judge was right in following the decision in *Bernard* v. *Aaron.* (3) That decision has stood since 1863, and there is a stream of authority in favour of the proposition it involves: Abbott's Law of Merchant Ships and Seamen, 14th ed. pp. 71-73. It is, moreover, in accordance with the American cases on this well-known custom of "thirds." "The master may hire the vessel . . . . on shares. The more frequent practice at the present day, when the master hires a vessel, is for him to take it on shares in which case he is considered as having the

(1) [1893] A. C. 8, 17.
(2) [1895] 2 Q. B. 539.
(3) 9 Jur. (N.S.) 470.
(4) 3 C. P. D. 121.
(5) (1829) 9 B. & C. 78.
(6) (1836) 2 M. & W. 215.

entire control and possession of the vessel": Parsons' Law of Shipping (1869), p. 281; *Cutler* v. *Winsor*. (1)

The real test is, who has control of the use of the vessel; and the respondent has proved that there was a parting with the control of this vessel during the continuance of each voyage, and that during the voyage the master can use her as and how he likes. This case falls within the second of Lord Tenterden's propositions in *Colvin* v. *Newberry* (2), and the master not being the servant or agent of the owner the latter is not liable: *Baumwoll Manufactur* v. *Furness* (3), in which case also Lord Herschell pointed out that the fact that a man was the duly registered owner was only prima facie evidence of ownership. A master has no general authority to bind his owner in home ports: *The Fanny; The Mathilda*. (4)

In *Boon* v. *Quance* (5), a case under the Workmen's Compensation Acts, it was held that the master of a barge working under the "thirds" system was not the servant of the owner.

[LORD COZENS-HARDY M.R. referred to *Jones* v. *Owners of the Alice and Eliza*. (6)]

Boon v. *Quance* (5) is indistinguishable from this case. There is a bailment to the master for the voyage and not an employment of him: *Doggett* v. *Waterloo Taxicab Co*. (7) A managing owner has a right to bail or charter the ship without consulting a co-owner.

The respondent submits that the case is governed by *Bernard* v. *Aaron* (8) and that Pickford J.'s judgment should stand.

Compston, K.C., in reply.

Cur. adv. vult.

Dec. 18. LORD COZENS-HARDY M.R. This action is brought to recover the amount of the loss of a cargo of cement shipped at a wharf belonging to the plaintiffs to Fowey in a ketch called the *Myrtle*. The *Myrtle* sank in calm weather in the Channel. The plaintiffs alleged and the defendant denied that she was unseaworthy when she sailed and that the loss was due to that.

(1) (1828) 23 Mass. Rep. 335.
(2) 1 Cl. & F. 283, 297.
(3) [1893] A. C. 8.
(4) (1883) 48 L. T. 771.
(5) 3 B. W. C. C. 106.
(6) (1910) 3 B. W. C. C. 495.
(7) [1910] 2 K. B. 336.
(8) 9 Jur. (N.S.) 470.

C. A. 1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Lord Cozens-Hardy M.R.

This issue has been found by Pickford J. in favour of the plaintiffs. It was alleged by the defendant and denied by the plaintiffs that the condition of the ketch was due to the berth being defective or dangerous. This issue has also been found by Pickford J. in favour of the plaintiffs. We have already held that these findings by Pickford J. are abundantly supported by the evidence and cannot be disturbed by us. There was a third issue. The plaintiffs alleged and the defendant denied that there was a contract between the plaintiffs and the defendant, and this issue was found by the learned judge in favour of the defendant, and judgment was entered for the defendant. From this judgment the plaintiffs appealed.

It is admitted that the defendant was the owner of the *Myrtle*, though at some date, not clearly ascertained, Smith became co-owner. For simplicity I shall treat Ashton as sole owner. It is also admitted that Cole was the master. It is not disputed that the *Myrtle* was being worked on "the thirds system," and that the master took two-thirds of the gross freights and thereout paid the mate and the crew and the cost of the provisions and expenses of the voyage. On the other hand the master handed over to the owner one-third of the gross freights less port dues, the owner providing the ship and paying for her upkeep.

In this state of things two documents were executed by Cole: (1.) A charterparty dated June 11, 1913, by which Cole, described only as "of the good ship or vessel called the *Myrtle*," chartered the *Myrtle* to the plaintiffs to convey cement from the charterer's wharf to Fowey at certain rates of freight. It is not necessary to refer in detail to the terms of the charterparty. (2.) A bill of lading dated June 17, 1913, in which Cole is described as "master of the said ship." The conditions of the charterparty are incorporated. In neither document is there any reference to the owner. The defendant contends that the only contract was with Cole, and that there is nothing to show that he was agent for, or servant of, an undisclosed principal. I am unable to accept this view. The observations of Lindley L.J. in *Manchester Trust* v. *Furness* (1) are important on this point.

(1) [1895] 2 Q. B. 539, 543.

He says: "The plaintiffs, who are holders of the bills of lading, rely upon the general rule of law that prima facie at all events a bill of lading signed by the master is signed by the master as the servant or agent of the shipowner. Of course, in the ordinary course of business that is so; but it may turn out that the master is not the servant or agent of the shipowner, and in the case to which we were referred of *Baumwoll Manufactur* v. *Furness* (1), the charter was such that the master was not the servant of the shipowner, but was the servant of the charterer. The peculiarity of that case was this, that although the charterparty there contained a great many clauses similar to those which we find in the charterparty in this case, the hiring of the master was by the charterer and not by the shipowner."

I think all the facts of the case must be looked at to ascertain whether Cole was really a bailee of the *Myrtle* or was the agent or servant of the owner. In truth this is a question of fact rather than of law. Unfortunately there is nothing in writing to define the relations between the owner and Cole. The owner did not give evidence, either in Court or by commission. We are left to spell out the truth as best we can from admitted facts.

Cole says he usually arranged the freight, as he did in this instance. He speaks of his "wages"—a word to which I do not wish to attribute undue importance, but which certainly is not what a bailee or hirer would be likely to use. He admits that he was appointed by the owner and could be removed at the end of the voyage, though not—except, I presume, on the ground of misconduct—during the course of the voyage.

Pickford J., contrary, I think, to his own opinion, thought he was bound by *Bernard* v. *Aaron* (2), decided in 1863, which, as he said, could scarcely be distinguished from the subsequent case of *Steel* v. *Lester* (3), decided in 1877. A careful examination of *Bernard* v. *Aaron* (2) satisfies me that that case does not really assist us. In the first place the sole question was whether Sharpley, one of the two co-owners, who had not appointed the master, was liable for the acts and defaults of the master

(1) [1893] A. C. 8. (2) 9 Jur. (N.S.) 470.
(3) 3 C. P. D. 121.

C. A. 1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Lord Cozens-Hardy M.R.

appointed by Aaron, another co-owner. It was held that Aaron had hired Sharpley's share. In the second place it was an action of tort, and this is an action ex contractu. It is worth mentioning that *Bernard* v. *Aaron* (1) appears never before to have been cited, and certainly it has not been treated as an authority laying down any principle.

On the other hand *Steel* v. *Lester* (2) is a direct authority in point. It has been recognized by the text-writers: Carver's Carriage by Sea, p. 49. The vessel was worked on the "thirds" system. The facts are in all material points identical except that the owner took one-third of the net profits, whereas the defendant Ashton took one-third of the gross profits. That distinction might be of importance if it were necessary for the plaintiff to establish a partnership between the defendant and Cole, but not otherwise. As was pointed out by Lindley J., the arrangement did not amount to a demise or anything of the kind. He says: "What is the true substance and result of that arrangement? We are asked to say that it amounted and was equivalent to a demise of the ship by the owner to the master, throwing the whole responsibility of the management on the master and taking it off the shoulders of the owner. I do not think such an arrangement amounted to a demise or anything of the kind. I look on it either as a mere mode of paying Lilee for his services—the owner paying him a share of profits instead of fixed wages and retaining control over the master, but leaving the master to choose his ports and men; or it was this, viz., that the defendant Lester, still remaining owner, became partner with the master for the adventure, sharing the profits with him. I rather think that the latter is the true view. But in either view the result is that the sloop was managed by Lilee for the joint benefit of himself and the owner. That is a consequence from which there is no escape."

The real control rested with the defendant, not with the master, and that is perhaps the critical test.

The respondent's counsel referred to the decision of this Court in *Boon* v. *Quance* (3) as laying down that there can be no

(1) 9 Jur. (N.S.) 470. (2) 3 C. P. D. 121.
(3) 3 B. W. C. C. 106.

contract of service between the owner and the master of a vessel worked on the "thirds" system and that the relation must be that of bailment. But in *Jones* v. *Owners of the Alice and Eliza* (1) it was clearly explained that such was not the effect of the decision in *Boon* v. *Quance*. (2) It is a question of fact to be decided upon the evidence in each case: see also *Smith* v. *Horlock*. (3) Moreover, the question under the Workmen's Compensation Act is whether the relationship of master and servant exists, and an answer to that question in the negative would be in no way decisive upon the question whether the owner of a vessel is answerable for the contracts made by the master. As was pointed out in *Steel* v. *Lester* (4), the question is whether the master was agent of the owner for the management of the vessel. Cases under the Workmen's Compensation Act are of little assistance.

The result is that in my opinion the appeal must be allowed and judgment entered for the plaintiffs for the amount claimed. The defendant must pay the costs here and below.

KENNEDY L.J. In this case the Court has decided to affirm the judgment of Pickford J. so far as he held that the defendant's vessel, the *Myrtle*, was unseaworthy for the voyage in question. It has also decided that that unseaworthiness was not due to any fault of the plaintiffs in regard to the condition of the berth in which the *Myrtle* lay at the time she took the cargo on board; and the unseaworthiness unquestionably caused the loss of the plaintiffs' cargo on board the *Myrtle*. The only question left for our judgment to-day is whether, in relation to the charter-party, the bill of lading and carriage of the goods, the master of the *Myrtle* was or was not the servant or agent of the defendant, who was the managing owner of the vessel, the alternative being that the master was the hirer of the vessel from the defendant and therefore to be regarded as an independent contractor solely liable for the unseaworthiness.

The question which I have so stated may be stated in the

(1) 3 B. W. C. C. 495.
(2) 3 B. W. C. C. 106.
(3) (1913) 6 B. W. C. C. 638.
(4) 3 C. P. D. 121.

C. A. 1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Kennedy L.J.

terms in which, in *Baumwoll Manufactur* v. *Furness* (1), Lord Herschell put the question in that case, in which the facts were not an alleged demise to a master, but an alleged demise to a charterer. Using the language as it would be applied to the present case, and quoting Lord Herschell, the question is whether there was a demise of this ship, or if not, strictly speaking, a demise, was there an agreement which put the vessel altogether out of the power and control of the then owner and vested that power and control in the master, so that during the time that the hiring lasted she must be regarded as the vessel of the master and not as the vessel of the owner?

Now in the present case there is not, as there was in the case to which I have just referred, a written agreement defining the terms on which the relation between the master and the defendant commenced or continued to exist. There is language used in the evidence, as appearing in the shorthand notes, which leads one to the impression that there probably was a letter, or there may have been two letters, which related to the arrangement—I shall use a neutral word—between the master and the defendant. But no document has been produced; and we have to come to a conclusion upon that which is truly an inference from facts, upon evidence not altogether satisfactory and possibly incomplete, which depends upon the statements of the master himself and also of a gentleman named Smith, who was a co-owner with the defendant, the managing owner, and who was called to give evidence for the defendant. The owner of the ship, the defendant himself, was not called, and the statement in the evidence, which I see no reason at all to disbelieve—I do not think it would be right to do so—is that his absence was due to illness; but whatever be the cause, we have to spell out the relations of the parties from oral evidence, and the inferences to be drawn from certain documents, the bill of lading and the charterparty, which are before us.

According to the evidence of Smith, when asked how the vessel was managed, he said that Ashton might have written to Cole saying he wanted Cole to work the vessel. It is, of course, always unwise and very often unjust to press particular words or

(1) [1893] A. C. 8, 14.

expressions of a witness who is not a specially skilled witness upon some matter upon which he may be presumed not to have accurate knowledge; but I think the fact that the defendant applied, so to speak, to Cole to work the ship is to some slight extent, at any rate, calculated to give the impression that he was applying for a servant or agent rather than the impression that he was engaging a person to contract for the use of the vessel as a hirer.

Again, if there was no written agreement, I think that, considering the change which a hiring of the vessel introduces in the relations of the parties who seek as shippers of goods to do business with the ship, it is to some extent more probable that the terms, which nobody sought to reduce accurately into writing, were terms such as not infrequently exist with regard to some vessels in an oral employment of a captain to work them. And more, it appears that this master was on more than one occasion wanted by the defendant to work this ship; and the second engagement, it is stated, was exactly in the same terms as the first. What were those terms? The terms were that the master was to take two-thirds of the gross earnings and the owners to receive one-third of the gross profits after certain deductions. Those deductions appear upon the evidence of the master and of Smith to have been of three kinds—harbour dues, towage dues, and brokerage. As an amount I daresay those deductions would not often be considerable—they might be very small; but at any rate it is a case in which deductions were made by the master from the gross takings before any portion of those takings was payable by him or payable by those over whom he had control to the owners at all. Although to some extent the comment I am about to make is applicable to all those items, I do think that the deduction of brokerage has some significance, because, assuming it was simply a demise of the ship to the master, it would not seem to be in the ordinary course, at any rate, that the master, who had the responsibility of working the ship, should be relieved of the cost of entering into the mercantile engagements of the vessel, but the defendant for himself and his co-owner was willing that that element should be deducted before he took any profit. In other words, to some extent I think it

C. A. 1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Kennedy L.J.

points to the engagement of the vessel being made on account of the managing owner and his co-owner. The owners also were to pay for the upkeep and insurance, but upon that I think no stress can be laid. If you once have the fact of a letting or demise, even in the case of house property, of course you may make any special reservations that you like with regard to the upkeep of the structure; and naturally enough the owner would wish to insure the vessel for his own interest; and, therefore, upon that no inference, I think, can be drawn at all hostile to the inference which the defendant in this case asks us to draw.

It also appears from the master's own words in evidence: "I paid the crew their wages, paid my own wages, and kept the crew in food." Again, I do not lay special stress upon the words "I paid my own wages"; but pro tanto to some extent it is not the phrase that I think even a comparatively illiterate man would have chosen of whom it could be truly said that he had bargained, either orally or in writing, for a hiring—I will not use the technical word "demise"—by himself for his own benefit, subject to a certain payment, of the ship *Myrtle* in this case. It is true that he entered into the charterparties in his own name, and entered into this particular charterparty in his own name. I will assume, though it would have been more satisfactory to have had definite written evidence, that that is true. But he also adds that he usually exercised his own discretion as to what cargo he should take. We have narrowly to scrutinize the somewhat ragged evidence which is given by word of mouth in this case. One cannot help saying that the word "usually" leads without unfairness to the implication that there were some cases in which to the best of his belief he had consulted the owner with regard to what cargoes he should take. Lastly, with regard to the terms as proved, he could, he says, be dismissed, but only on the termination of the voyage. There is nothing in that to my mind inconsistent with either view. If it had to be considered, I entirely agree with the other members of this Court that that does not negative the right of the owner, if he found that there was dishonesty or misuse of the vessel going on, to have summarily dismissed him. What I think is the fair meaning is: "Assuming

I have performed my part of my duty properly, whatever that may be, there would be no right to dismiss me until the voyage had ended." Naturally in any view that would be so, because his own remuneration—again to keep to a neutral term—was dependent upon the completion of the voyage, upon which alone, except in the possible case of the payment of advanced freight, would be dependent the right to the possibility of receiving any payment at all for his work.

Turning to the charterparty and the bill of lading in the particular case, it is quite true that Cole is not described as master in the charterparty. The words are "Cole of the good ship or vessel called the *Myrtle*," which are uncoloured one way or the other. He does not profess to sign as master, nor is there even the expression "for the owner." All that has to be considered in favour of the defendant's contention, so far as it goes; but speaking for myself, from such experience as one has gained in the Courts, I do not think either the presence or the absence of the words "for the owners" helps us much. It is an indefinite term, which leaves it still open to proof who the owners were, whatever words have been used. It is also in my experience, and impressed upon my mind, that it is not uncommon for the person who signs the charterparty, whether as agent or master, to leave the name of those for whom he signs blank. In the bill of lading Cole certainly executes the document in a form which shows that he was signing as master of the ship. I need not, I think, refer to the document itself, but the last clause after the particulars is "In witness whereof the master of the said ship hath affirmed to one bill of lading," and then there is the signature, "E. Cole." What is really and truly the inference to be drawn from these facts as they stand?

I think perhaps I should have added to the last remark that which is pointed out by Lindley L.J. in *Manchester Trust* v. *Furness* (1) with regard to bills of lading: "The plaintiffs, who are holders of the bills of lading, rely upon the general rule of law that prima facie at all events a bill of lading signed by the master is signed by the master as the servant or agent of the shipowner." Now, in considering that inference, I desire to say

(1) [1895] 2 Q. B. 539, 543.

C. A. 1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Kennedy L.J.

a word or two, because it was submitted to us more than once very properly by the learned counsel who argued for the defendant that no stress must be laid upon the fact that the defendant from the very beginning apparently remained the managing owner of this vessel upon the register. It is quite true that if there is no doubt at all as to there being upon the face of the contract a hiring or letting, which if not expressly so stated in terms is clearly to be inferred, the fact that the person who let out the ship or demised it was the managing owner upon the register is not a fact of importance. That was pointed out by Bowen J. in the well-known case of *Frazer* v. *Cuthbertson* (1), and was pointed out also, as counsel was good enough to show us, by Lord Herschell in *Baumwoll Manufactur* v. *Furness.* (2) Still, where you have to spell out the legal nature of the arrangement between the owner and somebody who it is suggested is a hirer of the vessel from the facts, the fact that the person who says he is not liable is the managing owner upon the register is a matter which may legitimately at any rate be borne in mind.

Bowen J., in the case to which I have just referred of *Frazer* v. *Cuthbertson* (1), in the course of his judgment said: "The registered owner, until the contrary is shown, may be presumed to be the employer of those who have the custody of her" —that is, the ship—"and who are engaged in her navigation." We have to see whether, taking that fact into consideration, we ought to be satisfied here that the owner, the defendant, did in fact enter into such a contract of hire or demise as the defendant asserts, the question being, I think, stated with great authority and very clearly by Lord Herschell in *Baumwoll Manufactur* v. *Furness.* (2) He refers to the case of *Frazer* v. *Marsh* (3), dealt with by Lord Ellenborough as far back as the year 1811. He says, and says with approval, that Lord Ellenborough rested his judgment upon the fact that the registered owner had divested himself of all control and possession of the vessel in favour of another, and that that person had all the use and benefit of it; and then Lord Herschell continues: "He puts the question to be

(1) (1880) 6 Q. B. D. 93, 97-98. (2) [1893] A. C. 8, 18.
(3) 13 East, 238.

determined thus, whether the captain in this instance who ordered the stores was or was not the servant of the defendant who was sued as the owner. He makes that the test of liability, and he says that if he has so divested himself of the vessel and of its use and benefit as that it is in the possession of another, whose servant the master is, then the owner ceases to be liable in respect of stores ordered by the master." In my opinion, having considered as far as I can with the utmost care the facts in this case and the legitimate inferences in my opinion to be deduced from them, it is not the case in the present instance that the owner has divested himself of the control and management of this ship, and the interest in this ship, so as to enable him to resist the plaintiffs' claim in this action. In my opinion the plaintiffs are entitled to succeed, because in the contract and in the carriage of the goods the master of this ship ought to be regarded as being the agent or servant of the owner.

If you turn from facts to authority, I think that the judgment of Lindley J. in *Steel* v. *Lester* (1) is a very important guide. As far as I can see, the only difference, if there be any difference in the two cases, that ought to be deemed material, or that could be put arguendo as material, is the difference which counsel insisted upon between the owner taking a third of gross profits subject to deductions and the owner taking a share of net profits, as was the case in *Steel* v. *Lester* (1), but it seems to me that there is really no substantial distinction to be drawn on that ground. I do not say that the sharing of net profits does not make, upon the circumstances of remuneration, an additional argument for a view against the owner's freedom from liability, but it seems to be in no case conclusive where in a sense there is a deduction, which may be at any rate substantial, from the gross profits in the form of harbour dues and towage—which are both matters relating to the working of the ship—and the brokerage which, it seems to me for the reasons I have already given, is even more significant than the others as pointing to the taking by the owner of a share of the burden and of the wisdom or unwisdom of the contracts of employment of the vessel into which the master may enter.

(1) 3 C. P. D. 121.

C. A. 1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Kennedy L.J.

In *Steel* v. *Lester* (1) the particular passage to which I would refer is that in which the learned judge first considers what the arrangement was: "It was this, that instead of Lilee being employed at standing wages, the defendant Lester, still remaining owner, allowed Lilee, who was master, to take the management of the ship on the terms that Lilee should pay Lester one-third of the profits. What is the true substance and result of that arrangement? We are asked to say that it amounted and was equivalent to a demise of the ship by the owner to the master, throwing the whole responsibility of the management on the master and taking it off the shoulders of the owner. I do not think such an arrangement amounted to a demise or anything of the kind. I look on it either as a mere mode of paying Lilee for his services—the owner paying him a share of profits instead of fixed wages, and retaining control over the master, but leaving the master to choose his ports and men; or it was this, viz., that the defendant Lester, still remaining owner, became partner with the master for the adventure, sharing the profits with him. I rather think that the latter is the true view. But in either view the result is that the sloop was managed by Lilee for the joint benefit of himself and the owner. That is a consequence from which there is no escape."

It is quite true that both Grove J. and Lindley J. speak, as confirmatory of their view of the effect of the contract on certain facts, of the existence of the owner on the register as managing owner; and also that at the close of Lindley J.'s judgment there is a reference to the fact that the master entered into the charterparty "for the owner"; but they treated those matters as strong evidence at the most by way of confirmation of a legal view which they base upon the terms of the contract itself.

There is a reference there to the fact that the master, as appears from the evidence in the present case, chose his own ports, so far as he was free to do so. He naturally did so incidentally through the charterparties or other engagements for the carriage of goods into which he entered, and also chose his own crew. I suppose in almost all cases the master is the man who chooses and employs his own crew. As I have said, so

(1) 3 C. P. D. 121.

far as the ports are concerned, they would depend generally, or to a very large extent, upon the terms of the contract into which he enters for the carriage of goods from one particular port to another. I did not mention that in the course of my statement of the relations of the parties, because it seems to me that it throws no light on the case in favour of the defendant, because it would be part of the bargain, if he is to be regarded as the person who enters into the engagements, that ports will follow; and with regard to the choice and payment of men, that is the ordinary duty of the captain, the ultimate payment resting upon the master, according to the arrangement of which I have already spoken.

My brother Pickford felt himself bound by the case of *Bernard* v. *Aaron*. (1) I say felt himself bound, because I entirely agree with what my Lord has said that, reading his judgment, I am certainly of opinion that he was not satisfied, but for that authority, that he was deciding rightly. He expresses himself in these terms after referring to the case: "I do not express any opinion as to whether the principle of *Bernard* v. *Aaron* (1) is right or is reconcilable with the other authorities that have been cited. I think it is an authority so much on all fours with the present case that I am bound to act upon it. It is not mentioned by Scrutton J. in his book, and it is only mentioned very casually in Mr. Carver's Law of Carriage by Sea, and mentioned in a way that leads me to think that Mr. Carver thought that it was in conflict with the current authorities. But I find it so much on all fours with this case that I do not feel myself justified in considering what I should decide apart from it, and upon that ground I think that the defendant is entitled to judgment." And then the learned judge adds: "It would be very satisfactory, I think, if the matter is cleared up by some Court which can disregard *Bernard* v. *Aaron* (1) if it thinks fit. I do not say it ought to do so. I do not think I am at liberty to do so, and therefore I say there must be judgment for the defendant on that ground."

That brings me to *Bernard* v. *Aaron*. (1) To begin with, that was a question not between master and owner, but between two

(1) 9 Jur. (N.S.) 470.

C. A. 1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Kennedy L.J.

co-owners. As to one of those co-owners, there was no doubt that he had taken upon himself the whole management and control of the ship. The Court in substance held that there was a demise—a hiring by that co-owner, who took from his co-owner the management of the vessel. They drew that inference from the facts of the case. But there was not present of course in that case what there is here, namely, the fact that in entering into shipping contracts for the carriage of goods there was that which Bowen J. referred to in *Frazer* v. *Cuthbertson* (1), namely, an acting by a person who, in the absence of proof to the contrary, might be presumed to be acting for the owner of the ship. Co-owners are not partners. There must be, as has been judicially pointed out, an assent by the several owners in order to make them liable for the acts of a man who may be apparently the managing owner or otherwise working the vessel. In such circumstances there must be an assent; that is elucidated in *Frazer* v. *Cuthbertson*. (2) With regard to a master, there is prima facie, at any rate, the presumption that he is acting, not for himself, but as employed by those who are in fact the owners of the ship.

In the next place the facts in *Bernard* v. *Aaron* (3) are meagrely stated; but so far as reported it is stated that the vessel was worked by Aaron on a principle well known amongst shipowners of "thirds," under which Aaron took two-thirds of the total gross earnings of the ship and Sharpley one-third, Aaron taking upon himself, as between himself and Sharpley, all the liabilities and expenses of the ship. There were no deductions so far as appears from the report. Personally I do not think that if you barely stated that the master was paid by receiving two-thirds of the gross earnings that would be sufficient to destroy the liability of the owner who paid him on that principle. But, be that as it may, the Court arrived at its decision upon the particular facts proved in that case. There had been a verdict by the jury at the trial. "There is no dispute" said Williams J.—and if I may say so with the utmost respect I agree with him—"about what the law of the case is; the only doubt raised is,

(1) 6 Q. B. D. 93. (2) 6 Q. B. D. 93, 98.

(3) 9 Jur. (N.S.) 470.

what is the true result of the facts laid before the jury. It is not disputed, that if the facts be taken to be that Aaron hired Sharpley's share of the ship at a rent of one-third of its gross earnings, Sharpley is, in that case, not liable for the negligence of the master, who, under these circumstances, is exclusively the servant of Aaron. On the other hand, if the result of the facts is, that there was one management of the ship under certain terms as to earnings, then Aaron would only be the agent of Sharpley, and Sharpley would be responsible for the acts of Aaron and the master; and I am of opinion that the true result of the facts before us is, that Aaron hired the ship from Sharpley, and that Sharpley is not liable for the negligence which caused this accident."

Willes J. said he was of the same opinion. Byles J. said also: "I am of the same opinion, but not without some degree of doubt"; and in coming to a conclusion apparently, on the whole, in agreement with the other learned judges he specially lays stress upon the fact that that was an action ex delicto, not an action ex contractu. It was a case very different from the present on the facts, because the thing complained of had nothing to do with the contract. It did not arise out of any arrangement made by the master for the working of the ship or the conduct of the carriage of the goods under that arrangement. It was a case in which some of the crew had negligently dropped a piece of timber on the plaintiff's horses and injured them. The question was, is the man, who was one of the two co-owners, as well as his co-owner liable for that act of negligence because the members of the crew who dropped the timber ought to be considered to be his servants? I for myself do not feel called upon to say whether *Bernard* v. *Aaron* (1) was rightly decided or not, and I do not think I should have any business to do so, without knowing more of the facts which were no doubt before the Court and before the jury, but which are reported only in the very brief form in which I have restated them from the report. But it is, as my Lord has pointed out, remarkable that so far as the learned counsel were able to tell us, and so far as one's own investigation into this case or previous knowledge can justify

(1) 9 Jur. (N.S.) 470.

C. A. 1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Kennedy L.J.

the conclusion, that case has never been cited as an authority. I think the explanation is that it is felt to be a case which, like the present, depends upon its own facts and upon the inferences to be drawn, as they were drawn no doubt, from a number of circumstances. I do not think in the present case that we are in any way bound by anything that appears in *Bernard* v. *Aaron*. (1)

There was one other case referred to, namely, *Boon* v. *Quance*. (2) My Lord gave judgment in that case, with which judgment Fletcher Moulton L.J. and Farwell L.J. agreed. My Lord pointed out very clearly in the judgment that it proceeded upon the ground of absence of evidence to justify that which was vital, namely, the proposition that the deceased man was a servant of Mrs. Quance. The deceased man in that case was the master of the ship himself. The widow deposed to that, which, if true, was a contract of service. Evidence was given in that case that a letter had been sent by the master to Mr. Quance, the owner's husband, asking him if he would be responsible for damage done to a cable by reason of the anchor having fouled it. The learned Master of the Rolls said: "In this case, I think there has been a mistake, and that there is not a scintilla of evidence to justify that which is vital to the present case, namely, the proposition that the deceased man was a servant of Mrs. Quance. I am very anxious not to say anything which may prejudice the subsequent appeals of *Boon* v. *Quance* (3) and *Cobbledick* v. *Quance* (4) as to which it is quite clear different considerations may arise." Then the circumstances of the deceased man Boon are referred to and the facts are stated, and the learned Master of the Rolls continues: "It is for him,"—that is, the dead man, the captain —"subject to any directions which may be given to the contrary (none such were given here) to go to what port he likes, to engage what crew he likes, to pay what wages he likes. His only obligation is to pay to Mrs. Quance one-third of the gross freight which may be earned, less 10*s*., which is something in the nature of a discount"—so that there were in fact no deductions

(1) 9 Jur. (N.S.) 470.
(2) 3 B. W. C. C. 106.
(3) 3 B. W. C. C. at p. 109.
(4) Ibid.

for what one may call the working of the ship or for the expenses of getting charterparties. "Out of the balance he pays his crew, pays any dues, and pays any expenses. In those circumstances what is there to suggest the relation of master and servant? According to the evidence, I think, of all these witnesses, there is no right even to terminate Captain Boon's possession of the vessel until the voyage is at an end. He was solely in control of the vessel, entitled to take it where he would, entitled to man it as he thought fit, and I cannot see anything which even lends colour to the suggestion that the relationship of master and servant existed between Mrs. Quance and Captain Boon. It is not necessary in the present case, and it is not desirable that I should indicate any opinion as to whether the master and Quance could be considered to be co-adventurers or whether the whole transaction was simply one of bailment of the vessel, the remuneration for the bailment being one-third of the gross receipts. On that I express no opinion."

It seems to me that there again you have a decision upon the facts as proved in the evidence, whether viewed as affirmative or whether considered in its meagreness. The conclusion that was come to in that case was a conclusion which I have no doubt was perfectly right, but in no way binds us on the very different facts of this case.

One may compare that case with the case of *Jones* v. *The Owners of the Alice and Eliza* (1), to the judgment of which I myself was a party, in which the owners called no evidence as to the relation between the master and themselves; but it was held that there was, on the special facts of the case, evidence to support the finding of the county court judge that a contract of service existed between the master and the owner. That was a case in which, as I have said, there was affirmative evidence by the widow that her husband was the servant of the owners, but the counsel for the owners submitted that the master was not a servant. The case of *Boon* v. *Quance* (2) was cited, and in my opinion now, as it was then, the different decision on the different evidence in *Boon* v. *Quance* (2) lends force to that which strikes me as the thing to be borne in mind above all others in dealing with a

(1) 3 B. W. C. C. 495. (2) 3 B. W. C. C. 106.

C. A. 1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Kennedy L.J.

case of this kind, namely, that we have to decide according to the true facts of the particular case.

It is not to be lost sight of, also, that that which the Court has to bear in mind is that the question of control is perhaps the most important, especially in workman and employer cases. You have to get that particular relationship which the Act of Parliament, which gives the right to compensation, requires to be proved, and it is somewhat of a different matter to consider whether or not there is a contract with a master for the use of the vessel; and you have the inference, which Bowen J. says is the true legal inference in the absence of anything to the contrary, or a presumption at any rate, that he was employed to navigate, and those who navigate a ship are employed by those who are the owners of the vessel to act as masters. When you bear all that in mind it seems to me that this case ought to be decided on its facts as not being a case in which the true inference, as shown to us by the evidence, is that the master was acting otherwise than as the agent or servant of Mr. Ashton.

SWINFEN EADY L.J. It having been established that the ketch *Myrtle* was unseaworthy on leaving the Thames and starting on her voyage to Fowey, and it having now been decided that such unseaworthiness was not caused, as alleged, by any act of the plaintiffs in giving her a bad and unsafe loading berth, the question remains whether the defendant as owner of the vessel is liable to the plaintiffs for the loss of their cargo of cement shipped on board.

In my judgment this depends upon the true inference to be drawn from the facts proved.

If Cole, the master, hired the ship from the owners and sailed her on his own account, engaging and paying the crew and paying as consideration for the hire one-third of the gross freights received, less harbour dues and towage, Cole would be the charterer of the ship and alone liable to the plaintiffs. If, however, Cole, the master, was sailing the ship as the servant of the owners, being remunerated by a share of the gross earnings, out of which he was to pay the wages of the crew and the cost of

their food, then the defendants, the shipowners, will be liable to the plaintiffs for the loss of their cargo.

The law was thus stated by Lord Tenterden in the House of Lords in *Colvin* v. *Newberry* (1): "Two propositions of law are clear, as applicable to a case like this: the first is, that in the common case of goods shipped on board a vessel belonging to a person, of which the shipment is acknowledged by a bill of lading signed by the master, if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship; the other, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested charters that ship to another for a particular voyage, although the absolute owner provides the master, crew, provisions and everything else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship, and who is considered the owner pro tempore, during the voyage for which the ship is chartered. It cannot be maintained against the person who has let out the ship on charter, namely, the absolute owner." Again in *Bernard* v. *Aaron* (2) Williams J. stated the law in the same way.

Indeed these general propositions of law were not disputed, but it was contended by the defendant that where a ship is sailed "on thirds," meaning thereby that the master pays to the owners one-third of the gross freights and retains for himself the other two-thirds, paying thereout for provisions and the wages of the crew, such an arrangement amounts in law to a bailment of the ship, and the master is not the servant of the owners but charterer and alone liable for the goods shipped on board. In my opinion this proposition cannot be maintained. It is a question of fact in each case whether the transaction amounts to a hiring of the ship and whether the master is the servant of the owner; the answer depends upon the proper conclusion to be drawn from all the facts proved.

The proper conclusion of fact in the present case is that Cole, the master, managed and sailed the ship for the joint benefit of himself and the owners and that there was not any

(1) 1 Cl. & F. 283, 297. (2) 9 Jur. (N.S.) 470, 471.

C. A. 1914

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LIMITED v. ASHTON.

Swinfen Eady L.J.

demise or bailment of the ship to him. It is quite consistent with such an arrangement that he should be left to choose his own crew and arrange the charters, which latter he said he usually did, but apparently not always. He was asked, "Did you communicate with Mr. Ashton before chartering, or were the instructions from him?" He answered, "I usually used my own discretion that way as to what cargo I should take."

It was pointed out by Lindley J. in *Steel* v. *Lester* (1) that where an owner pays a master a share of profits instead of fixed wages, retaining control over the master but leaving him to choose his ports and men, such an arrangement would not amount to a demise or anything of the kind. Nor in my judgment would such an arrangement amount to a demise if the owner received a share of gross freights instead of net profit. By retaining control over the master the owner in such a case retains control over the ship.

In the present case the master was appointed to sail the ship. He could not lay her up instead of sailing her, as prima facie a charterer may if it is worth his while to do so. The owners in effect say, You must work the ship for our benefit, although also for your own benefit. Again, I cannot doubt that for misconduct the master could have been dismissed, even during a voyage, if he put into a port and misbehaved himself and the owners became aware of it. Again, the master himself referred to the remuneration coming to him as his "wages." He was also asked in chief: Q. Could Mr. Ashton dismiss you and if so when?—A. He has not dismissed me during the time I was there. Q. If he wanted to dismiss you, when could you have been dismissed?—A. At the end of the voyage. This language is appropriate to the dismissal of a servant but not to the termination of a charterparty.

In *Manchester Trust* v. *Furness* (2) Lindley L.J. said that the general rule of law was that prima facie at all events a bill of lading signed by the master is signed by the master as the servant or agent of the shipowner. To determine the question of liability the test in each case is whose servant is the master? Who is his undisclosed principal when he signed the bill of

(1) 3 C. P. D. 121. (2) [1895] 2 Q. B. 539, 543.

lading? In my opinion the answer to that question in the present case is that he signed the bill of lading as master and the servant of the owners, and was not himself the charterer of the vessel.

The result is that the appeal ought to be allowed, but in so deciding I do not consider that we are overruling *Bernard* v. *Aaron* (1), the decision in which case turned upon the particular facts, which are very meagrely reported.

Appeal allowed.

Solicitors: *Ballantyne, Clifford & Hett; W. & W. Stocken.*

R. M.

MITSUI *v.* MUMFORD.

1914

Dec. 10, 21.

Insurance—Policy on Trader's Goods on Land—Owner indefinitely prevented from dealing with them—Restraint of Princes—Constructive Total Loss.

Semble that, for the purpose of determining whether there has been a total loss under a policy on commercial goods on land, the same considerations must be taken into account as would be taken into account for the purpose of determining whether there has been a constructive total loss under a marine policy; with this exception, that under the former notice of abandonment is not a necessary condition of a valid claim. (2)

TRIAL of action before Bailhache J. without a jury.

The action was to recover as for a total loss under a policy on timber stored in warehouses in Antwerp. The policy was for a period of three months from August 4, 1914, to November 3, 1914, and was against "loss directly caused by war, military or usurped power . . . . No claim to attach hereto for delay, deterioration and/or loss of market, or for confiscation by the Government of the country in which the property is situated." On October 9 Antwerp was taken and occupied by the German forces, which assumed the military government of the city. The plaintiffs were a Japanese company with a London house, who had shipped the timber in question from Japan to Antwerp, and stored it in warehouses there to await opportunity for sale. The plaintiffs claimed that by reason of the occupation of Antwerp by the

(1) 9 Jur. (N.S.) 470.

(2) In view of the commercial importance of this question an exception is made to the rule of reporting only actual decisions on points of law.—F. P.

1914

MITSUI v. MUMFORD.

Germans they were deprived of the power of dealing with the timber and were unlikely to recover that power within a reasonable time, and that they had consequently suffered a constructive total loss of the timber. On October 14 they gave notice of abandonment to the defendant. The timber was still safe in Antwerp, and had not been seized by the German authorities, at the time of the hearing of the action, after the period covered by the policy had expired. There was evidence that the plaintiffs not unfrequently had timber lying in their warehouses for many months before they were able to sell it.

Leslie Scott, K.C., and *Raeburn*, for the plaintiffs. Under the law of marine insurance a deprivation for an indefinite period of the goods insured is treated as a constructive total loss: *Rodoconachi* v. *Elliott.* (1) The same principle must apply to a policy on goods on land, where the goods insured are commercial goods which are for sale. In each case, if the owner is deprived of the power of dealing with his goods for an indefinite time, he loses the commercial adventure. There was such a deprivation here. Germany being at war with this country, the occupation of Belgium by the Germans, and the taking over by them of the complete administration, military and civil, of that country, converted it into enemy territory. No doubt a merely temporary occupation by the enemy will not convert a country into enemy country: *The Gerasimo* (2); but here the Germans treated Belgium as a conquered country the ownership of which had passed to them. Then if Antwerp had become enemy territory the plaintiffs had lost their power to deal with the timber, for any dealing with it in enemy territory would amount in law to a trading with the enemy and therefore to a criminal offence. The plaintiffs must for the purposes of this case be treated as British subjects, and a British subject could not lawfully after declaration of war send and fetch his own goods out of German territory: *The Rapid.* (3) In that case a native American citizen having purchased goods in England before the declaration of war by the United States deposited them on an island

(1) (1874) L. R. 9 C. P. 518. (2) (1857) 11 Moo. P. C. 88.
(3) (1814) 8 Cranch, 155.

belonging to the English. On the outbreak of war he hired a vessel to fetch them away. She loaded the goods and was arrested with them on board by an American privateer. The goods were condemned as lawful prize on the ground that the act of removing the goods was a trading with the enemy and conferred upon them the character of enemies' property. It was there laid down that "The object, policy, and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states." If the plaintiffs could not lawfully fetch their timber away, still less could they deal with it in the ordinary course of their business by selling it. Such trading is prohibited not only by the common law but also by the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), and the Royal Proclamation made thereunder dated September 9, 1914. Here as the timber must stay in Antwerp it is lost for the purposes of the plaintiffs' business. No distinction is to be drawn between a deprivation for an indefinite time and a permanent deprivation. As Lush J. said in *Geipel* v. *Smith* (1), "A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this." Further, not only is there a constructive loss of this timber by reason of the plaintiffs being indefinitely deprived of it in a commercial sense, but there was also from the time when Antwerp was seized by the Germans, and still is, a strong probability of an actual loss by its being commandeered by the Germans for military purposes, and though the enemy may give formal receipts for it, those receipts will at the conclusion of the war presumably be worthless.

Leck, K.C., and *R. A. Wright*, for the defendant. There was no loss within the meaning of the policy. There was no actual loss, for at the date when the policy expired the timber was still intact in the plaintiffs' warehouses. If this had been a marine policy no case could have been made for the plaintiffs except upon the basis of the loss being constructive, but the doctrine of constructive total loss has no application to a non-marine policy. If an owner of goods is prevented from getting at them, what he

(1) (1872) L. R. 7 Q. B. 404, at p. 414.

1914

MITSUI v. MUMFORD.

suffers is not a loss of the goods but a loss of the user of them. A temporary restriction upon their sale only amounts to a loss of market, and that is expressly excluded by the terms of the policy. It is not conceded that the plaintiffs would have committed any offence against the law of this country if they had endeavoured to deal with their timber. Trading with the enemy is only an offence if done without licence from the Government, but the plaintiffs would have had no difficulty in obtaining the Government's licence to regain possession of their property. There was no risk of the timber being actually lost, for the Hague Convention of 1907 expressly forbade the confiscation of private property without payment, though it allowed seizure on payment of an indemnity; and it must be presumed that any receipt notes given by the requisitioning authority will be duly honoured.

Leslie Scott, K.C., in reply.

Cur. adv. vult.

Dec. 21. BAILHACHE J. read the following judgment:—This is an action upon a war risks policy on timber of the plaintiffs stored in warehouses at Antwerp. The plaintiffs are a Japanese company with a London house. They carry on a timber business at Antwerp through brokers and agents there. The Antwerp business is managed by their London house. They import timber into Antwerp, sell it as occasion offers, and meanwhile store it in warehouses there. Some of their timber remains many months in store.

The defendant is the leading underwriter upon the policy, which is dated August 5, 1914, and is a three months policy from August 4 to November 3. The risks insured against so far as material are thus described in the policy: "Against loss of timber at Antwerp directly caused by war, military or usurped power, and no claim to attach thereto for delay, deterioration, and/or loss of market or for confiscation by the Government of the country in which the property is situated."

The plaintiffs by their points of claim allege that they have suffered a total or constructive total loss, and that they gave notice of abandonment on October 14 last.

Before proceeding to consider whether upon the facts of this case there has been a loss within the meaning of the policy it is necessary to determine the meaning to be attached to the word "loss" as here used. The plaintiffs by their pleadings claimed that "loss" means total or constructive total loss, and they have alleged in the latter connection notice of abandonment. In other words they have treated the policy as if it was to be construed as a marine policy. The defendant says this is entirely wrong and that the allegation of constructive total loss coupled with notice of abandonment discloses no cause of action. I think the plaintiffs' pleading is wrong in form. The expression "constructive total loss" is so far as I know never used except in marine insurance, and this is not marine insurance. Moreover the rule that to entitle an assured to claim for a constructive total loss there must be a precedent notice of abandonment is confined to and is an integral part of constructive total loss, and is unknown outside marine insurance. (See per Brett L.J. in *Kaltenbach* v. *Mackenzie*. (1)) It does not to my mind follow from this that actual permanent deprivation of the timber is essential in this case. This is a business policy, and if the facts showed a loss of the timber in a commercial sense I should hold the plaintiffs entitled to succeed. If, for instance, the plaintiffs were unable, owing to a peril insured against, to deal with this timber and were liable to be prevented for so long a time that the cost of warehousing would in all probability exceed the value of the timber before the plaintiffs could dispose of it, I should be prepared to hold that there was a loss of the timber within the meaning of the policy. In such a case there would need to be an abandonment of the timber to the underwriters. Abandonment and notice of abandonment are of course quite different things. The former is common to all contracts of indemnity, the latter as giving special rights to the assured is peculiar to marine insurance. Notice of abandonment would not be a condition precedent to the plaintiffs' right to recover for a commercial loss under this policy; but it would none the less be a prudent and businesslike step to take.

Since writing this judgment I have read over again some

(1) (1878) 3 C. P. D. 467, at p. 471.

1914

MITSUI v. MUMFORD.

Bailhache J.

observations of Blackburn J. in advising the House of Lords in *Rankin* v. *Potter*. (1) I had forgotten them and had arrived at the conclusion indicated by me unaided by authority, but I am strengthened in my view by what Blackburn J. there says. The result is that although I think it is wrong to use the expression "constructive total loss" in connection with this policy, and unnecessary to allege notice of abandonment, yet it is right in considering whether there has been a loss under this policy to take into account considerations similar to those which one would take into account in determining a question of constructive total loss under a marine policy. It is from this standpoint that I approach the facts of this case, and the plaintiffs' contentions based upon those facts.

The facts so far as the timber is concerned are that it remains stored in the same warehouses as at the date of the policy, and is being watched by two foremen of the plaintiffs' agent at Antwerp, a Mr. Meerbergen. It was safe at the end of November. It is in fact and has been during the continuance of the policy in the custody and under the control of the plaintiffs' agent just as it was before the war. The remaining facts are that Antwerp was seized by the Germans on October 9 last, and has since then been, and still is, in their occupation, and that the Germans have assumed the military government of the city, and, as the plaintiffs assert, the civil administration also. This latter is not so certain, but I will assume it to be so for the purposes of this case. Upon these facts the plaintiffs base the following propositions: (1.) That Antwerp is alien enemy territory for the time being. (2.) That business intercourse with persons in Antwerp is forbidden by common law and by the Proclamation of September 9 last. (3.) That the plaintiffs are thereby deprived of the possession of that timber or, at any rate, of the power of selling it. (4.) That the timber is thus a total or constructive total loss, or, as I think it should be put, a loss within the meaning of this policy.

I will assume in the plaintiffs' favour the accuracy of the first two propositions. I say "assume" because in the view I take of this case it is not necessary for me to express a concluded

(1) (1872) L. R. 6 H. L. 83, at p. 119.

opinion upon either proposition, although as at present advised I think both are sound. A very useful discussion of the nature of the occupation by an invader which will make the invaded and occupied territory enemy territory for the time being will be found in the case of *The Gerasimo*. (1) An actual instance of hostile occupation amounting to a temporary annexation of territory is to be found in the case of *The United States* v. *Rice*. (2)

The second proposition seems somewhat harsh. It amounts to this, that a person, a subject of a friendly Power, who at the beginning of the war traded here and at Antwerp, cannot write and send a business letter from this country giving instructions to his Antwerp agent as to his business there. The cases have gone far in this direction, and upon authority I am inclined to think the plaintiffs are right. See the American case of *The Rapid* (3) and *M'Connell* v. *Hector*. (4) I think too that the Proclamation recognizes and enforces this proposition.

The plaintiffs' first contention is that the facts stated, coupled with the legal effect of those facts, together constitute a loss of their timber within the meaning of the policy. This construction seems to me unsustainable. The timber is in the possession of their agent in Antwerp unharmed just as it was before the war. They have lost the power of immediately dealing with it, but that seems to me, and subject to their next point, loss of market rather than loss of goods, and for loss of market only the defendants are not liable.

The plaintiffs next say that although this is in terms a war risk policy on goods, it is a business policy and is not on goods simpliciter, but on goods for trading: that what is really insured is the commercial adventure, and that if that is frustrated by a peril insured against the underwriters are liable. They say this timber is not in the warehouse as furniture or panelling, but is there for sale, and impossibility or indefinite postponement of sale is equivalent to loss, and they refer me to transit cases where goods have been insured while in transit by sea and land and by reason of some peril insured against the commercial object of the transit has been defeated, and the underwriters have been held liable as

(1) 11 Moo. P. C. 88.
(2) (1819) 4 Wheaton, p. 246.
(3) 8 Cranch, 155.
(4) (1802) 3 Bos. & P. 113.

1914

MITSUI v. MUMFORD.

Bailhache J.

for a loss of the goods although the goods have not been destroyed, but only the venture which caused them to be in course of transit. *Rodoconachi* v. *Elliott* (1) is such a case. I find it impossible to apply the doctrine of destruction of a contemplated adventure, to use Lord Ellenborough's expression, to the case of goods in warehouse under no contract of sale but merely waiting a favourable opportunity for sale, especially as in this case a considerable quantity of timber is normally in warehouse for many months. In my judgment this point fails.

The plaintiffs' last point is that there has been a loss of the timber because, although it has not been seized by the Germans, it is held up in Antwerp, the plaintiffs are unable to dispose of it, and there is strong probability that it will either be confiscated by the Germans or at least commandeered by them. If confiscated, it will of course be lost; if commandeered, it will be represented only by a receipt of more than doubtful value.

Now goods of private persons on shore are, by the law of nations, not liable to confiscation, and I ought not judicially to assume that the Germans will commit a breach of international law. No doubt the timber might be taken by the Germans for the purposes and necessities of war, but I must not assume that they would not pay for it. Even if I make these assumptions which the plaintiffs desire, the timber is at present in the hands of the plaintiffs' agent, no loss by confiscation has happened, there has been no seizure by the Germans, and the policy has expired. Without seizure the plaintiffs cannot lay any foundation upon which to support this claim, and it fails.

In my judgment there has not been a loss of this timber to the plaintiffs either actual or commercial.

The result is that I must give judgment for the defendant with costs.

Judgment for defendant.

Solicitors for plaintiffs: *Waltons & Co.*

Solicitors for defendant: *Mellor & Co.*

(1) L. R. 9 C. P. 518.

J. F. C.

LONDON AND NORTH WESTERN RAILWAY COMPANY v. JONES.

1915
Feb. 16, 19.

Railway—Regulation—Provisional Order—Demurrage on Trucks—Reasonableness of Charges—Right of Action—Jurisdiction—Difference—Arbitration—London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 *Vict. c. ccxxi.*), *Sched., s.* 5, *sub-s.* 4.

A railway Act confirming a provisional order, by s. 5, sub-s. 4, empowered the railway company to charge traders a reasonable sum by way of addition to the tonnage rate for, inter alia, the detention of trucks, and provided that "any difference arising under this section shall be determined by an arbitrator":—

Held, that the only case in which an action can be brought to recover charges for the detention of trucks under an enactment in the above terms is where the defendant has agreed to pay the sum demanded but has failed to do so. If there is a refusal to pay and no agreement to pay can be proved, the case must be treated as one in which a "difference" has arisen within s. 5 which must therefore be determined by an arbitrator and not by an action.

London and North Western Ry. Co. v. *Donellan* [1898] 2 Q. B. 7 and *Midland Ry. Co.* v. *Loseby* [1899] A. C. 133 followed.

London and North Western and Great Western Joint Ry. Cos. v. *Billington* [1899] A. C. 79 discussed.

Appeal from the Swansea County Court.

The action was brought to recover 2*l.* 15*s.* 6*d.* demurrage charges in respect of the detention of certain trucks at Gorseinon station on the plaintiffs' railway. The defendant was the consignee of goods carried in the trucks and had received advice notes from the plaintiffs informing the defendant of the arrival of the goods consigned to him on the conditions shown on the back of the notes, one of which conditions was that after the termination of the transit, as therein defined, goods carried by the plaintiffs would be subject to charges for demurrage at a specified rate per truck per day. (1)

(1) Sect. 5, sub-s. 4, of the Schedule of Maximum Rates and Charges in the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), which confirmed a provisional order of the Board of Trade made under the Railway and Canal Traffic Act, 1888, enacted as follows: "The company may charge for the services hereunder mentioned, or any of them,

1915

LONDON AND NORTH WESTERN RAILWAY v. JONES.

In this case the sum charged was 1*s.* 6*d.* per truck per day, which amounted for the period of detention to 2*l.* 15*s.* 6*d.*, the sum claimed in this action.

Evidence was given at the trial that the defendant had promised to pay the sum demanded. This was denied by the defendant, who said that the reason why there had been delay in taking delivery was that he could not get access to the trucks.

The county court judge gave judgment for the plaintiffs for 1*l.* 17*s.* He appended to his notes a supplementary note as follows: "I came to the following conclusions of fact and law in this case: That the difference between the parties had not arisen before the plaint was entered, and that the Court had jurisdiction; that the plaintiff company failed to prove to my satisfaction that the scale of demurrage charges put in by the plaintiff company was valid and binding as against the defendant; that the sum adjudged to the plaintiff company was the equivalent of the damage it had actually sustained."

The plaintiffs appealed.

Eustace Hills, for the plaintiffs. The county court judge had no jurisdiction to inquire into the reasonableness of the plaintiffs' charges. If any question had arisen on that head, it was a "difference" within s. 5 of the company's Act of 1891 and a matter for arbitration as provided by that section: *London and North Western Ry. Co.* v. *Donellan.* (1) The judgment of the Court of Appeal in that case was reversed in the House of Lords —*London and North Western and Great Western Joint Ry. Cos.* v. *Billington* (2)—on a question of fact, but the decision of the Court of Appeal that the reasonableness of the railway company's charges is a matter for arbitration was not impeached, and it was approved of by the House of Lords in *Midland Ry.*

when rendered to a trader at his request or for his convenience, a reasonable sum, by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party . . . .:—

"(iv.) The detention of trucks . . . . beyond such period as shall be reasonably necessary for enabling the . . . . consignee to . . . . take delivery thereof . . . ."

(1) [1898] 2 Q. B. 7.

(2) [1899] A. C. 79.

Co. v. *Loseby.* (1) If no difference as to the reasonableness of the charges has arisen between the railway company and the trader before the issue of the writ, and the Court finds that the services have been rendered and accepted, no question as to the reasonableness of the charges can be raised at the trial: *Great Western Ry. Co.* v. *Phillips.* (2)

Parsons, K.C., and *Trevor Hunter*, for the defendant. None of the authorities is directly in point, though there are no doubt dicta in some of them which appear to support the plaintiffs' contention. But *Billington's Case* (3) in the House of Lords does decide that if no difference has arisen before action the Court, and not the arbitrator, has jurisdiction; and, therefore, on the county court judge's finding of fact in this case he had jurisdiction to try the action. The plaintiffs' contention that the county court judge could not inquire into the reasonableness of the charges involves this result, that if, to take an extreme case, a railway company issued a writ immediately after the services had been rendered and before the trader had any opportunity of disputing the reasonableness of the railway company's charges, he would for ever after be debarred from raising that point. That is a startling proposition and one which would require very clear authority to support it. The Legislature cannot have intended that, in a case in which the Court has jurisdiction to entertain the action, its jurisdiction should be limited to entering judgment for the amount claimed. The true view is that if either party invokes the aid of the Court that party cannot be heard to say that the power of the Court to deal with the merits of the case is limited.

Eustace Hills replied.

Cur. adv. vult.

Feb. 19. ROWLATT J. read the following judgment:—This was an action by the railway company to recover 2*l.* 15*s.* 6*d.* in respect of detention of trucks under s. 5, sub-s. 4, of the London and North Western Railway (Rates and Charges) Order Confirmation Act, 1891. The defendant was a consignee of certain goods,

(1) [1899] A. C. 133. (2) [1908] A. C. 101.
(3) [1899] A. C. 79.

1915

LONDON AND NORTH WESTERN RAILWAY v. JONES.

Rowlatt J.

the arrival of which had been notified to him upon the usual form which intimated that after a certain day he would be charged at a certain rate for detention of trucks if he did not take delivery. The amount sued for is the amount which would be due applying the terms of the notice to the date on which he did take delivery of his goods.

At the trial evidence was given that the defendant had promised the stationmaster to pay this sum. This was denied by the defendant, who also called evidence to show that the reason why he had not taken delivery before was because he could not get access to the trucks. The learned judge in a supplementary note states that he came to the following conclusions of fact and law: "That the difference between the parties had not arisen before the plaint was entered, and that the Court had jurisdiction; that the plaintiff company failed to prove to my satisfaction that the scale of demurrage charges put in by the plaintiff company was valid and binding as against the defendant; that the sum adjudged to the plaintiff company was the equivalent of the damage it had actually sustained." It was contended before us that in view of the first finding the learned judge was bound to enter judgment for the full amount claimed and had no jurisdiction to inquire into the amount.

It is now quite clear from the decisions in *London and North Western Ry. Co.* v. *Donellan* (1) and *Midland Ry. Co.* v. *Loseby* (2) that if there is a difference of any kind arising under the section before action, that matter must be decided by arbitration and the Courts have no jurisdiction to determine that difference. It does not, however, follow that the Courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying. This much at any rate is clear from the decision in the House of Lords in *London and North Western and Great Western Joint Ry. Cos.* v. *Billington* (3), where the company did obtain judgment in the Courts although there had been no arbitration. If that case proceeded upon the basis that, as upon the findings of the county court judge the defendant had accepted the services

(1) [1898] 2 Q. B. 7. (2) [1899] A. C. 133.
(3) [1899] A. C. 79.

with full knowledge of what was charged without contesting their reasonableness, he could not be heard to say that there was any difference and must be treated as having agreed the charges in spite of the fact that he protested he would not pay, no difficulty arises. It may be, however, that though no difference has arisen before action in the shape of a demand made and challenged, it cannot be shown on the other hand that the demand has been agreed to. Such a case can readily be imagined as arising under s. 6 where the trader would not in the ordinary course send a notice to the company as to the amount he would charge if his trucks were detained, and might commence an action without giving an opportunity to the company of raising any difference fit for arbitration. In such a case does *Billington's Case* (1) lay down that the action is properly brought, and, if so, must judgment be given for the amount claimed, or is the Court to enter into the questions which, if the defendant had raised his points before action, would have been submitted to arbitration? Either course presents great difficulties. Looking at the wording of the order and remembering the circumstances under which this legislation was passed, one would think that the intention was clearly expressed that differences as to the rights of a railway company or trader under the sections were in no case to be for the Courts, but in every case for arbitration, and this seems to me to be amply borne out by what was said in the cases already referred to, and in the further case of *Great Western Ry. Co.* v. *Phillips*, especially by Fletcher Moulton L.J., when that case was in the Court of Appeal. (2) On the other hand, if the defendant, whether trader or railway company, is not to be able to make any defence merely because he has not put his point before action (perhaps because the other side gave him no opportunity) and notwithstanding that he can never be said to have agreed the demand, an injustice would be done which it is hardly possible to contemplate as being in accordance with the law. In truth, the argument that this result must follow (which is what Mr. Eustace Hills contended for) proves too much. His argument is that a point which has not been taken to arbitration, for whatever reason, cannot be raised before the Court. He

(1) [1899] A. C. 79. (2) [1907] 2 K. B. 664, at p. 674.

1915

LONDON AND NORTH WESTERN RAILWAY v. JONES.

Rowlatt J.

advanced that with reference to the question of reasonableness, which is all very well. But the point that the service has never been rendered at all would, according to the decisions, also be for the arbitrator if raised before action, and Mr. Hills's argument would lead to the result that if the defendant had never denied that the work had been done before action he could not raise that before the Court — in other words, that judgment would follow the writ as matter of course. It seems to me that we are bound to hold, firstly, that the only case in which the Court can be appealed to before arbitration is where the defendant has agreed the demand and merely refuses to pay; secondly, that wherever this cannot be shown and he has not paid, the case must be treated as one in which a difference has arisen; and, thirdly, that the decision in the House of Lords in *Billington's Case* (1) is no authority to the contrary.

That being so, what is the effect of the findings in the present case? If the first finding means that liability for the amount claimed had been assented to by the defendant before action, and the last two findings merely mean that the judge considered he had a right to reduce the charges in spite of that assent, the effect would be that the plaintiffs would be entitled to succeed. I do not think, however, that we can assume that this is what is meant. I think, if the company desire it, the case ought to go back to the judge to find whether the defendant did enjoy the service in fact with knowledge of the charges that would be made and without objecting to them. If he does find that, the appeal succeeds. If he does not, it fails, and if there had been a cross-appeal the proper order would be that the action be dismissed. I think the railway company should be entitled to elect whether they will have the appeal dismissed or sent back to the Court below for the above-mentioned purpose.

SHEARMAN J. I am entirely of the same opinion. I have had an opportunity of reading the judgment which has just been read by my brother Rowlatt, and what I am adding is in no sense to qualify what he has written, but merely to express in different words the same conclusion. Looking at the London

(1) [1899] A. C. 79.

and North Western Railway (Rates and Charges) Order Confirmation Act, 1891, and dealing with s. 5, and particularly sub-s. 4, and s. 6, I think it clear that the intention of that Order was to exclude from the jurisdiction of the ordinary Courts any dispute which might arise within the purview of those sections and sub-sections. I think that is quite clear from the cases to which my brother has referred, and there is no case which is in contradiction of it. When one looks at the case of *London and North Western and Great Western Joint Ry. Cos.* v. *Billington* (1), which at first sight seems to raise a doubt, it will be seen that the Lord Chancellor said: "Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable." I read those words as meaning that if there was a bona fide dispute that the charges were unreasonable, that must go to the arbitrator. Under those circumstances the law is this, that the matter must go to the arbitrator, and the ordinary Courts have no jurisdiction to determine anything which comes with the purview of the section. I think the judgment in the present case is wrong because the county court judge, in assessing the sum of 1*l.* 17*s.* as the equivalent of the damage actually sustained, was dealing with a matter which was outside his jurisdiction.

If the finding of the county court judge, that the difference between the parties had not arisen before the plaint was entered, means that, the services having been rendered and the charges not having been disputed before the plaint was entered, an agreement by the defendant to pay could be assumed, then the Court had jurisdiction and the plaintiffs would have been entitled to judgment for the amount claimed. But if the finding means that although no difference had actually arisen yet the defendant had never agreed to pay the charges demanded by the plaintiffs, then judgment ought to have been entered for the defendant on the ground that the matter was one for arbitration and not for the Court. The county court judge appears to have

(1) [1899] A. C. at p. 81.

1915

LONDON AND NORTH WESTERN RAILWAY v. JONES.

Shearman J.

taken a middle course, and to have assumed that he had jurisdiction to decide as to the reasonableness of the plaintiffs' charges on the ground that although there was a bona fide dispute between the parties it did not amount to a difference within the meaning of the section. I think that in these circumstances the case ought to go back to the county court judge for him to deal with it on the basis indicated by my brother Rowlatt's judgment, unless the plaintiffs prefer to have the appeal dismissed. (1)

New trial ordered.

Solicitor for plaintiffs: *C. de J. Andrewes.*

Solicitors for defendant: *T. D. Jones & Co., for E. Harris, Swansea.*

F. O. R.

1915
Feb. 10.

LISTON AND OTHERS *v.* OWNERS OF STEAMSHIP CARPATHIAN.

[1914 L. 1526.]

Ship—Seaman—Contract of Service for Commercial Voyage—Subsequent Outbreak of War—Refusal to proceed to Sea except under Contract with Master for Extra Remuneration—Right to recover Extra Remuneration from Owners—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 113, 114.

The plaintiffs were engaged as seamen on a British ship on a commercial voyage from London to Port Arthur, Texas, and to a final port of destination in the United Kingdom. Upon arrival at Port Arthur she discharged her outward cargo and took on board a cargo of black oil. News having arrived that a state of war existed between Germany and England and that the *Karlsruhe*, a German cruiser, was in the vicinity of Port Arthur, the plaintiffs refused to proceed to sea and to complete the voyage, on account of the extra risk due to the outbreak of war which they would incur, unless they received extra remuneration. The master, being unable otherwise to obtain their services, signed an agreement to pay them an extra 12*l.* each to take the ship home:—

Held, that the risks of war not being contemplated by the seamen when they made the bargain for the commercial voyage, and the risk

(1) Counsel for the plaintiffs elected to have the case sent back to the county court judge.

1915

LISTON v. STEAMSHIP CARPATHIAN (OWNERS).

of capture and of danger from mines on the voyage home being risks which might reasonably be taken into consideration, the plaintiffs were discharged from their obligation to proceed on the voyage, the master was impliedly clothed with authority from the owners to make such reasonable contract with the plaintiffs as he could to obtain their services, and the contract was binding on the owners.

ACTION tried before Lord Coleridge J. without a jury.

The plaintiffs, seven seamen, claimed 84*l.* alleged to be due by the defendants to the plaintiffs on an agreement in writing dated August 16, 1914.

The plaintiffs were engaged as seamen on the *Carpathian*, a British ship of which the defendants were the owners on a commercial voyage from London to Port Arthur, Texas, and to a final port of destination in the United Kingdom.

The *Carpathian* left Victoria Docks, Tilbury, for Port Arthur on July 24, 1914. She arrived at Port Arthur about August 12, when she discharged her outward cargo and loaded a cargo of black oil. At the trial there was a conflict of evidence as to whether the oil was of such a nature that it could be used as a lubricant and was therefore contraband. While at Port Arthur news arrived that a state of war existed between Germany and England. Between August 12 and 16 the men were told by the officers on board that they were going to Rotterdam.

The ship's crew were also made aware of the presence in the vicinity of a German cruiser called the *Karlsruhe*. The plaintiffs thereupon refused to proceed to sea and to complete the voyage, on account of the extra risk they would incur due to the outbreak of war, unless they received extra remuneration. The master, being unable otherwise to obtain their services, signed the following agreement to pay them an extra 12*l.* each to take the ship home:—

"S.S. *Carpathian.*

"Port Arthur.

"Sunday, August 16, 1914.

"The following men having refused to proceed to sea unless I promise to give them twelve pounds each to take the steamer to her final port in the United Kingdom, I hereby promise that amount in order to enable me to proceed to sea."

1915

LISTON v. STEAMSHIP CARPATHIAN (OWNERS).

The plaintiffs demanded the increased wages on account of the risk of being captured or sunk.

The vessel returned home without lights and with her lifeboats ready for lowering. When she arrived in the English Channel she was stopped by a British cruiser and ultimately ordered to London.

Evidence was given by the superintendent of the defendants' line of steamers to the effect that all their steamers had crossed the Atlantic after the outbreak of war and had never seen a warship until they got into the Channel, and that the captain of the *Carpathian* had no authority to pay increased remuneration.

The defendants, on the arrival of the *Carpathian* in England, refused to pay the 84*l.* The plaintiffs brought this action to recover that sum as wages, being 12*l.* due to each plaintiff under the above-mentioned agreement.

By s. 113 of the Merchant Shipping Act, 1894, "the master of every ship . . . . shall enter into an agreement . . . . in accordance with this Act with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom." By s. 114 the agreement "shall be in a form approved by the Board of Trade, and shall be . . . . signed by the master before a seaman signs the same" and shall contain (inter alia) "the amount of wages which each seaman is to receive."

Ivor Bowen, K.C., and *S. Duncan*, for the plaintiffs. A peaceful voyage only and not war risks being contemplated when the crew undertook the voyage, the war risks entitled the plaintiffs to refuse to proceed to sea unless they received the extra remuneration: *O'Neil* v. *Armstrong, Mitchell & Co.* (1); *Palace Shipping Co.* v. *Caine.* (2) It is not the law that there must be a danger to life in the further prosecution of the voyage in order that seamen may be released from their articles. The change from a peaceful commercial voyage to one involving an ordinary war risk is sufficient. In *Palace Shipping Co.* v. *Caine* (2) Lord Loreburn L.C. in delivering judgment said: "The master had no right to require that these men should sail for Sasebo, for the risk was not a commercial risk, nor the voyage a commercial

(1) [1895] 2 Q. B. 70; 418. (2) [1907] A. C. 386.

voyage such as the articles contemplated. The contention that there was in fact no danger of capture is not established. I cannot doubt that the owners themselves thought there was danger, and the men thought so also, and with reason. It is nothing short of preposterous to expect that seamen in a strange port shall speculate on the movements of belligerent war vessels, and nicely weigh the chances of capture."

The master of the vessel was the general agent of the owners for all matters concerned with the navigation of the vessel.

A. Neilson, for the defendants. A seaman is not entitled to wages beyond those appearing in his articles of agreement for a voyage which is in the course of being carried out under the agreement: *Harrison* v. *Dodd* (1); *Thompson* v. *Nelson*. (2) The dictum of Channell J. in *Thompson* v. *Nelson* (2) that "it might be agreed during the voyage that the person employed as a seaman should perform some additional services not contemplated at the time when the contract contained in the articles was entered into, and extra remuneration for those services might be agreed upon to which no objection could be made," is only applicable where a seaman is called upon to perform some duties entirely outside the articles and does not apply to the present case, where there was merely an alteration in the risk. There was no consideration for the promise to give the extra wages. Unless the increased risk amounts to a risk to life, seamen cannot claim any sum beyond the wages specified in the articles, and the master has no implied authority to make a bargain for extra wages on behalf of the owners of the ship: *Harris* v. *Carter* (3); *Hartley* v. *Ponsonby* (4); *The Araminta*. (5) In the present case there was no risk to life.

The risks which the plaintiffs were called upon to face by the voyage home were not such as to entitle them to break their articles of agreement. In August, 1914, Germany had not commenced the practice of sinking merchant ships without making provision for the safety of their crews. It must be admitted that if there was a danger to life by undertaking

(1) (1914) 30 Times L. R. 376.
(2) [1913] 2 K. B. 523.
(3) (1854) 3 E. & B. 559.
(4) (1857) 26 L. J. (Q.B.) 322.
(5) (1854) 18 Jur. 793.

1915

LISTON v. STEAMSHIP CARPATHIAN (OWNERS).

the voyage home the plaintiffs would be released from the articles, but there is no evidence of that. The plaintiffs did not leave the ship and they must be held to have continued to serve under the articles. In *Palace Shipping Co.* v. *Caine* (1) the seamen declined to proceed upon the voyage.

LORD COLERIDGE J. This case raises an important question of mixed law and fact. The plaintiffs are seven in number and they bring an action for 12*l.* each under an agreement made with the master of the steamship *Carpathian* at Port Arthur in Texas on August 16, 1914; and the question is whether they can upon that contract recover the extra remuneration for their services as seamen from the owners of the ship. The question whether the master of the ship had implied authority to make the bargain on behalf of the owners is also involved.

The ship was on a commercial voyage. She sailed on July 24, 1914, from the Victoria Docks in London and proceeded to Port Arthur in Texas. While there news arrived that a state of war (which began on August 4) existed between Germany and England. The ship's crew were also made aware of the presence in the vicinity of the *Karlsruhe*, a German cruiser. The *Carpathian* had as its cargo a quantity of black oil which is said on the one hand to be, and on the other hand not to be, contraband of war. This is immaterial as she was a British ship and thus liable to capture whatever the nature of her cargo. What I have to decide is whether the seamen were, under the circumstances, discharged from their obligation to serve any further on the vessel. If they were discharged from that obligation the authorities show that the captain could not punish them for not serving, nor enforce their service, and that he had implied authority from the owners to enter into such a contract as is sued upon in this action in order to obtain their services and to ensure that they would incur the war risk whatever it might be, in reliance upon the promise of increased remuneration.

The question therefore is whether the seamen could have lawfully remained on shore and declined to join the ship when it sailed.

(1) [1907] A. C. 386.

It is quite clear that seamen who enter into a contract of service as seamen cannot, because they do not like the conditions of their service, or there happens to be a storm, or because under certain circumstances they are asked to do a little more or harder work in consequence of illness of the crew or for some other reason of a similar nature, demand to be released from their contract; for that is the result if they are entitled to require increased remuneration. They undertake by their contract to give their whole time, and they also undertake certain risks of navigation which are well known to all of them; and all those risks are in contemplation between the parties when the wages are fixed. But it is quite clear that it was not in the contemplation of the parties when they made this bargain that war would be declared between the country of the ship and another Power, both being maritime Powers and both having vessels of war which might or might not overrun the very portion of the sea through which this vessel was to pass; because the *Carpathian* was bound to Rotterdam, and she had, therefore, not only to cross the Atlantic within possible sight of the *Karlsruhe*, but also to go up the English Channel and encounter any war vessels and other dangers which possibly might be there in order to reach the port of Rotterdam. Prima facie a war risk is not necessarily a risk to life. A risk to life has in certain circumstances, which it is not necessary to enter into, been held to be a ground for the discharge of the contract. But that is not the guiding point of my judgment in this case. The test is whether there were war risks which in the reasonable contemplation of the parties might involve capture at sea. In embarking on a vessel upon a commercial voyage one does not include among the risks of the voyage capture by an enemy. What were the risks which a reasonable seaman might contemplate in the present case? The mere fact of war existing between two Powers might not involve any substantial or even any risk on a voyage at sea, even though the ship belonged to one of the belligerent Powers. But in the present case so great was the risk of capture that the ship proceeded across the Atlantic without lights, and indeed when she arrived at the jaws of the Channel she was diverted from her course by a British cruiser,

1915

LISTON v. STEAMSHIP CARPATHIAN (OWNERS).

Lord Coleridge J.

and was finally told she could not go to Rotterdam, and found her ultimate port of destination in London; the voyage, through the risks consequent upon the war, not being able to be completed. I must of course not consider what happened after the plaintiffs considered themselves free from the contract as decisive. The question is whether their conduct in seeking to be discharged from their contract was reasonable. I think they might reasonably take into consideration the risk of the ship being captured by the enemy. They also might reasonably consider the risks from mines run throughout the voyage, and moreover there would be the risks attached not only to the presence of the *Karlsruhe*, but in the progress up the Channel of other units of the German fleet. In my judgment, therefore, it was perfectly reasonable to consider every risk of capture attending the homeward part of the voyage of this vessel.

In these circumstances I am of opinion that the crew were justified in remaining on shore at Texas and refusing to proceed on the voyage, and, that being so, that they were discharged from their obligation to sail. The master therefore was unable to compel them to continue their services, and he was impliedly clothed with authority from the owners to make such reasonable contract with them as he could to obtain their services, and if that contract could not be obtained without extra remuneration, that contract is binding both upon the master and the men. I therefore give judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Humphreys, Phillips & Co.*
Solicitors for defendants: *Botterell & Roche.*

J. E. A.

THEATRE DE LUXE (HALIFAX), LIMITED *v.* GLEDHILL.

1914
Dec. 16.

Cinematograph—Licence—Condition ultra vires Licensing Authority—Children under Ten Years of Age forbidden to be on Licensed Premises after 9 p.m. —Cinematograph Act, 1909 (9 *Edw.* 7, *c.* 30), *s.* 2, *sub-s.* 1.

By s. 2, sub-s. 1, of the Cinematograph Act, 1909, which is entitled "An Act to make better provision for securing safety at Cinematograph and other Exhibitions," it is enacted that "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid"—i.e., for cinematograph exhibitions—"on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine."

A licence was granted under the section subject to the following condition:—"Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 P.M. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 P.M.":—

Held (*per* Lush and Rowlatt JJ., Atkin J. dissenting) that the condition was ultra vires inasmuch as there was no connection between the ground upon which the condition was imposed, namely, regard for the health and welfare of young children generally, and the subject-matter of the licence, namely, the use of the premises for the giving of cinematograph exhibitions.

Per Atkin J.: The restriction upon the power of the licensing authority to impose conditions on the grant of licences is that the conditions must be (1.) reasonable; (2.) in respect of the use of the licensed premises; (3.) in the public interest. Subject to that restriction there is no fetter upon the power of the licensing authority. They are entitled to take into account the public interest so far as children are affected, and the condition was not ultra vires.

CASE stated by justices for the county borough of Halifax.

An information was laid by the respondent, William Gledhill, the chief inspector of police of Halifax, against the appellants, the Theatre De Luxe (Halifax), Limited, charging them for that they on June 2, 1914, being the occupiers of certain premises known as the Theatre de Luxe, situate in Northgate, Halifax, did unlawfully allow the premises to be used for the exhibition of pictures or other optical effects by means of a cinematograph for the purposes of which inflammable films were used in contravention of a condition subject to which the licence relating to the

1914

THEATRE DE LUXE (HALIFAX), LIMITED v. GLEDHILL.

premises had been granted under the provisions of the Cinematograph Act, 1909. (1)

Upon the hearing of the information it was proved or admitted before the justices that on June 2, 1914, the appellants were the occupiers of the premises, and that on that date a licence under the Cinematograph Act, 1909, was current in respect of the premises which had been granted by the justices to whom under s. 5 of the Act of 1909 the Halifax County Borough Council had delegated their powers as licensing authority, and that the licence had been granted upon (inter alia) the following condition:—"Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 P.M. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 P.M."

It was further proved that on June 2, 1914, two children under the age of ten years, one being five years of age and the other two years and five months, were upon the appellants' licensed premises at ten minutes past 9, when pictures were being shown in the theatre, and that the appellants had allowed the children to be upon their licensed premises at that time.

The justices accordingly found as a fact that the appellants had

(1) Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 1: "An exhibition of pictures or other optical effects by means of a cinematograph, or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or, save as otherwise expressly provided by this Act, elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act."

Sect. 2, sub-s. 1: "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine."

Sect. 3: "If the . . . . occupier of any premises allows those premises to be used, in contravention of . . . . the conditions or restrictions upon or subject to which any licence relating to the premises has been granted under this Act, he shall be liable, on summary conviction, to a" penalty.

By s. 5 a county council may, with or without any restrictions or conditions as they may think fit, delegate to justices sitting in petty sessions any of the powers conferred on the council by the Act.

allowed their licensed premises to be used in contravention of the condition subject to which the licence for the premises had been granted under the Act.

It was contended on behalf of the appellants that notwithstanding the matters proved before the justices the appellants ought not to be convicted of the offence charged against them on the ground that the condition was illegal as being ultra vires and one which the licensing authority had no power to impose in that it was (1.) unreasonable; (2.) neither clear, positive, nor definite; (3.) in restraint of trade; (4.) beyond the powers given by the Cinematograph Act, 1909.

On behalf of the respondent it was contended that under s. 2 of the Cinematograph Act, 1909, the licensing authority have full discretion to impose any reasonable condition they may think desirable in the public interest, that they are not limited to conditions relating only to public safety, and that the condition which the appellants were charged with contravening was reasonable having regard to the health and wellbeing of young children in the borough of Halifax.

The justices were of opinion that the respondent's contentions were correct and that the condition was neither ultra vires nor unreasonable, and accordingly convicted the appellants of the offence charged against them.

The question for the opinion of the Court was whether the justices were correct as a matter of law in holding that the condition was good in law and binding upon the appellants.

Tindal Atkinson, K.C., and *W. H. Gingell*, for the appellants. The licensing authority had no power to impose the condition. The power to impose conditions is limited to theatres where inflammable films are used (1), and the conditions must be reasonable. The licensing authority claim the right to impose a condition which is in their opinion reasonable with regard to the health and welfare of children. They have no right to make that condition. If the Legislature had thought right to prevent children under a certain age from attending cinematograph theatres during certain hours they would have done so in the

(1) See *Ellis* v. *North Metropolitan Theatres*, p. 61, post.

1914

THEATRE DE LUXE (HALIFAX), LIMITED v. GLEDHILL.

Children Act, 1908 (8 Edw. 7, c. 67), but there is no provision to that effect in that statute. The licensing authority cannot exercise their power of imposing conditions under the Cinematograph Act, 1909, if only uninflammable films are used in the theatre (1), but this condition would cover that case. They have no power to make regulations for the health and well-being of children apart from the question of good order in the theatre. The condition the licensing authority has imposed is illimitable and an interference with the liberty of the subject. The theatre is just as dangerous at 2 P.M. as at 9 P.M. The appellants would be bound by this condition even though no inflammable films were used. (1) Upon these grounds the condition is ultra vires the licensing authority. [*London County Council* v. *Bermondsey Bioscope Co.* (2), *Fielding* v. *Morley Corporation* (3), *Macdonald* v. *Lochrane* (4), and *Rossi* v. *Edinburgh Corporation* (5) were referred to.]

Montgomery, K.C., for the respondent. The licensing authority had the power to impose the condition. The limits to the power of the licensing authority is that the conditions must be (*a*) reasonable, (*b*) in relation to the licensed premises, and (*c*) in the public interest. *London County Council* v. *Bermondsey Bioscope Co.* (2) shows that the condition must be in relation to the conduct of the licensed premises. The power to impose conditions is analogous to that of licensing justices in the case of the grant of an off liquor licence. In *Ex parte Richards* (6) it was held that a condition attached to the grant of a music and dancing licence that a charge should be made of at least 3*d.* per head for admission and that the charge should not be returned in the form of refreshment was good. Although as regards the case of an off licence the justices have no power to impose conditions, they could make the grant taking into consideration an undertaking given by the grantee that his premises shall not be open between certain hours as being against the public interest, e.g., that it is not desirable that women should be admitted between those hours: *Rex* v. *Beesly*. (7) *Rossi* v.

(1) See *Ellis* v. *North Metropolitan Theatres*, p. 61, post.
(2) [1911] 1 K. B. 445.
(3) [1899] 1 Ch. 1.
(4) (1887) 51 J. P. 629.
(5) [1905] A. C. 21.
(6) (1904) 68 J. P. 536.
(7) [1912] 3 K. B. 583.

Edinburgh Corporation (1) has no bearing upon the present case. The conditions in the licence which the magistrates attempted to impose in that case went far beyond the powers given to them by the Edinburgh Corporation Act, 1900 (63 & 64 Vict. c. cxxxiii.), s. 80, as amended by the Edinburgh Corporation Order Confirmation Act, 1901 (1 Edw. 7, c. clxxxiv.), s. 57. The decision in *Scott* v. *Pilliner* (2) was based upon the ground that the by-law was so wide that it embraced several matters which had no relation to betting or good government. In *Teale* v. *Williams* (3) it was held that the commissioners under the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), might under s. 21 of the Act make orders for the prevention of obstruction in particular streets applicable to every day of the week. The intention of the Legislature was to give wider powers to the licensing authority under the Cinematograph Act, 1909, than it usually does to licensing authorities. There is nothing said in the Act of 1909 as to any conditions as to good character as there is in the Licensing Acts, as it was thought better that the licensing authority under the Cinematograph Act, 1909, should deal with that matter. In effect the condition imposes a closing hour with regard to children. That is within the province of the licensing authority. The condition deals with the licence and the licensed premises. The only restriction placed on the powers of the licensing authority is contained in s. 2, sub-s. 1. [The Public Health Act, 1890 (53 & 54 Vict. c. 59), s. 51, sub-s. 2, and *Groh* v. *Hesketh* (4) were also referred to.]

Tindal Atkinson, K.C., in reply. The only authority as to the interpretation of s. 2 of the Cinematograph Act, 1909, is *London County Council* v. *Bermondsey Bioscope Co.* (5) Any restriction imposed by the licensing authority must have some relation to the performance at the theatre. But this condition has regard to the health of young children alone and has no relation to cinematograph performances. It in substance places the justices in the position of the Legislature. [The Children Act, 1908 (8 Edw. 7, c. 67), ss. 120, 121, was also referred to.]

(1) [1905] A. C. 21.
(2) [1904] 2 K. B. 855.
(3) [1914] 3 K. B. 395.
(4) [1907] 2 K. B. 232; [1908] 1 K. B. 654.
(5) [1911] 1 K. B. 445.

1914

THEATRE DE LUXE (HALIFAX), LIMITED v. GLEDHILL.

LUSH J., after stating the facts, continued: The question raised before the justices and before us is whether the condition subject to which the licence was granted is or is not ultra vires the licensing authority. On behalf of the respondent it was not disputed by Mr. Montgomery that if the condition is ultra vires the appellants are entitled, although the licence was given and accepted with that condition, to take advantage of the contention that it is ultra vires. The question therefore is whether the condition is one which it is within the power of the licensing authority to impose. The title of the Cinematograph Act, 1909, is "An Act to make better provision for securing safety at Cinematograph and other Exhibitions," and by s. 1 it is provided that the Act shall only operate in the case of a cinematograph or other similar apparatus with inflammable films, and no doubt there would be very considerable room for argument that the terms and conditions which the licensing authority have power to impose by s. 2 are limited to terms and conditions for giving proper effect to the disclosed object of the statute, which is to make provision for safety and nothing else. That question, however, we are not at liberty to consider because it has been already dealt with and decided by the Divisional Court in *London County Council* v. *Bermondsey Bioscope Co.* (1) The Court in that case came to the conclusion that the power to impose terms and conditions is not limited to matters which are necessary for securing safety and we are bound by the decision. The Court does not appear to have attempted to lay down any test as to what limit must be placed upon the powers of the licensing authority to impose terms and conditions. The condition imposed was one against opening on Sundays, Good Friday, and Christmas Day. It was pointed out by Avory J. that that condition was only one which compelled the licensee to obey the existing law because it was forbidden to open such places by the Sunday Observance Act. Pickford J. said in the course of his judgment that the conditions must be reasonable. There is no doubt that that is so, and on behalf of the respondent Mr. Montgomery does not dispute it. The question therefore is whether this is a reasonable condition having regard to the

(1) [1911] 1 K. B. 445.

subject-matter of the licence required by the Cinematograph Act, 1909, under which it has been imposed. The ground upon which this condition was said to be reasonable was that it was reasonable having regard to the health and wellbeing of young children in the borough of Halifax. Mr. Montgomery also conceded that the condition must be reasonable having regard to the conduct of the licensed premises, or in other words that it must be a reasonable condition having regard to the subject-matter of the licence, and if this condition were reasonable having regard to the subject-matter of the licence, namely, the use by the licensee of these premises for cinematograph exhibitions, it would be very difficult for us to say that it was in excess of the powers of the licensing authority. I quite agree that one ought to be slow to fetter a power vested in a local authority by the express terms of a statute. But when one comes to consider the meaning of this condition and the ground upon which it is said to be reasonable, it seems to me to be clear that the licensing authority has imposed this condition not because the cinematograph exhibition of itself requires for the safety and welfare of the children that they should be controlled by such a condition. The condition is reasonable, if at all, not because it is connected with cinematograph exhibitions, but because it is desirable for the health and welfare of small children that they should not be in any place of public entertainment in certain circumstances and unless accompanied by a parent or guardian. That is the ground upon which this condition is said to be reasonable. Is there any connection between that ground for imposing this condition and the subject-matter of the licence, namely, the use of the premises by the licensee for the giving of cinematograph exhibitions? It appears to me that there is no connection at all, although it may be highly desirable that young children should not be in places of public entertainment after certain hours. That is just as true of other places of entertainment, and I can see no possible connection between cinematograph exhibitions, which alone the authorities ought to have considered when they imposed this condition, and the hour at which young children should be admitted to places of amusement. In my opinion this condition

1914

THEATRE DE LUXE (HALIFAX), LIMITED v. GLEDHILL.

is ultra vires the licensing authority and the conviction must be quashed.

ROWLATT J. I am of the same opinion. The appellants were convicted under s. 3 of the Cinematograph Act, 1909, for allowing their premises to be used in contravention of a condition or restriction subject to which the licence was granted. They contend that this condition was not within the competence of the licensing authority to impose and was not valid, but was ultra vires the licensing authority and also unreasonable. In order to see what conditions the licensing authority can impose it is necessary to consider the Act. By s. 2 the county council are empowered to grant licences to such persons as they think fit to use the premises specified in the licence for the purpose of cinematograph exhibitions on such terms and conditions and under such restrictions as, subject to the regulations of the Secretary of State, the council may determine. Sect. 3 says that "if the occupier of any premises allows those premises to be used" in contravention of those conditions or restrictions he is liable on summary conviction to a fine. When s. 3 says "if the occupier . . . . allows those premises to be used" it is, I think, clearly referring to user on the part of the occupier by himself or his subordinates. It does not mean used by a member of the public coming in to enjoy the entertainment afforded there, and when the statute speaks of conditions or restrictions which must not be contravened in the user it deals with conditions and restrictions which affect the user of the premises by the licensee. Under these circumstances one can at once think of a great many restrictions and conditions which might be imposed upon the user of the premises by the licensee. It has been held that the power to impose them is not confined to conditions or restrictions in the interests of safety from fire or indeed safety at all. There are many other restrictions, e.g., in respect of public decency and public order, the protection of employees, time and periods of opening, and other matters which might be thought of with reference to the user of the premises by the licensee. The restriction must be brought within this limitation. But the condition we have to consider seems to me to travel

into an entirely different region. It is only nominally a condition affecting the user of the place by the management and it really affects the user of it by a section of the public. It does not say that no children shall enter the theatre, thus limiting the scope of the theatre to adults. I express no opinion whether that condition would be good or bad. The condition accepts the position that children of any age may come in either accompanied or unaccompanied by grown-up people up to 9 o'clock, but after that hour it says that no children shall be there at all under ten, and if over ten and under fourteen the child must be accompanied by its parent or guardian. It is perfectly obvious that, looking at it apart from what appears in the case, the authority was addressing itself to a social question entirely independent of the management of this place as a picture theatre, a very broad and important question on which one may have opinions, and if the council could enter into it one would not say that the conclusion to which they had come was unreasonable. If they are the judges whether children under ten should go to a cinematograph exhibition after 9 o'clock, it would be very difficult to say that the condition was unreasonable, but it seems to me that under this Act they are not the judges of that question of public policy. It was suggested in the argument on behalf of the respondent that justices when exercising the power of granting off licences may say "We will not grant this off licence except on an undertaking that the premises are not open till 11 o'clock, because we wish to keep out women until that hour." It seems to me that the subject-matter in that case is very different. The authority is given power to limit the sale of liquor for consumption in persons' own homes. The widest questions of social policy are involved. It is an entirely different class of case to this and does not afford us any assistance. There is one other reason which has not been mentioned in argument. I presume that the condition refers to the premises when being used under the licence. If it is wider than that and means at any time it is hopelessly bad, because the owner is not bound to use the premises only for a cinema. He could use them for a concert or a Sunday lecture, and to say that the condition should then apply and that children should

1914

THEATRE DE LUXE (HALIFAX), LIMITED v. GLEDHILL.

not be on the premises except in accordance with it would of course be hopelessly bad. For these reasons I think this appeal should be allowed.

ATKIN J. I have had considerable doubt in this case because I can see that the contention of the respondent would, if we upheld it, give power to a public authority to interfere very seriously with what is now no doubt a very substantial public industry. But at the same time I myself have found an insuperable difficulty in seeing what limitation can be imposed upon the powers given to the public authority under the terms of s. 2 of the Cinematograph Act, 1909. The terms of the section itself are quite unrestricted. It is to be noticed that these powers are given in the first instance to a large representative body, the county council, and s. 5 provides that the council may delegate its powers to committees or to district councils with or without any restrictions or conditions as they think fit.

The question as to the limitation of these powers arose soon after the Act of 1909 was passed in *London County Council* v. *Bermondsey Bioscope Co.* (1) In that case the contention on behalf of the company was that the powers of the county council were limited to making such regulations as were necessary for the purpose of safety on the premises, and that contention was negatived by the Court in terms. They said that the powers were not limited to making regulations for the purpose of the public safety, and in order to arrive at that result the Court appears to me to have laid down what the powers were. Lord Alverstone C. J. said: "The language of s. 2, sub-s. 1, seems to me to be quite clear, and we must therefore construe it according to its plain meaning. In my opinion that section is intended to confer on the county council a discretion as to the conditions which they will impose, so long as those conditions are not unreasonable." Pickford J. said: "If that enactment stood alone, I do not see how it could be denied that, subject to the regulations of the Secretary of State, the county council might impose such conditions, so long as they were not unreasonable, as they thought right. The section, however, does not stand alone.

(1) [1911] 1 K. B. 445.

The title of the Act is 'An Act to make better provision for securing safety at Cinematograph and other Exhibitions'; and then comes s. 1, which I need not read again. It is argued that the title shows that everything which has to be done under the Act must be done for the purpose of securing safety, and that s. 1 strengthens that view because the regulations to be made by the Secretary of State are confined to regulations for securing safety. I do not think that that argument is sound. Sect. 1 expressly limits the power of the Secretary of State to make regulations 'for securing safety,' whereas there is no such limitation imposed upon the power of the county council under s. 2. It may well be that the Legislature thought that, in addition to regulations which are specially directed to securing safety, it would be a further means of securing safety to give to the county council a free power to impose such terms, conditions, and restrictions as they thought right." It appears to me that the Divisional Court in that case did adopt the larger view of the powers of the county council that is contended for by the respondent in the present case and that we are bound by that decision. It was not laid down by the Court that the power of the council was without any restriction. The Court decided that the county council has a discretion as to the conditions they will impose provided that the regulations are reasonable. It was contended by the respondent in the present case, and in my view rightly contended, that there is a limitation of the powers of the county council, namely, that the restriction must be reasonable and in relation to the exercise of the powers granted under the licence of the licensed premises qua licensed premises and in relation to the public interest. If those three conditions are complied with, it appears to me that there is no other fetter upon the discretion given to the licensing authority. I have felt the greatest difficulty in seeing what limitations can be imposed if they fall short of those I have mentioned. I feel the greatest difficulty in saying that a condition may be imposed compelling a cinematograph entertainment to be closed to the public at a stated time, e.g., at 11 o'clock, unless it is justified by the principle that it is in the general interest of the public.

1914

THEATRE DE LUXE (HALIFAX), LIMITED v. GLEDHILL.

Atkin J.

The power is not made use of by the authorities because they think the entertainment would be more disorderly if the house remained opened till 12 o'clock, but because they think it in the public interest generally for the house to close at 11. They have power to say that the entertainment shall not begin till 2 o'clock in the afternoon. I imagine they are entitled to say that because they do not think it is in the interest of the public at large that these places of entertainment shall be open in the morning, just as it is open to licensing justices to say that the sale of drink shall not take place before a particular hour in the morning. I think they are entitled to fix their hours in relation to the public interest, and in my judgment if they take into account the interests of a very substantial and large section of the public they are entitled to do so. In my opinion, therefore, in the exercise of these powers they are entitled to take into account the public interest so far as children are affected, and it appears to me that they are justified in saying that children under fourteen years of age shall not be present at this class of entertainment after 9 o'clock unless they are accompanied by their parent or guardian, who can form a decision as to the nature of the entertainment then being presented and also can prevent the child from roaming about the streets at the end of the performance or coming into contact with undesirable persons. It appears to me that this provision is one which cannot be said to be unreasonable, and in my judgment it is one which it is within the scope of the licensing authority to make. I think, therefore, that this conviction was quite proper; but my brothers think otherwise, and the appeal must in consequence be allowed.

Appeal allowed.

Solicitors for appellants: *Nicholls, Herbert & Co., for Arthur Willey, Leeds.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Percy Saunders, Halifax.*

J. E. A.

ELLIS *v.* NORTH METROPOLITAN THEATRES.

1915
Feb. 2.

Cinematograph Licence—Conditions attached to—Validity of—Cinematograph Act, 1909 (9 *Edw.* 7, *c.* 30).

Although a cinematograph exhibition at which only non-inflammable films are used may be given without any licence under the Cinematograph Act, 1909, at all, it is no objection to the validity of a condition attached by the licensing authority to the grant of a licence under s. 2 of that Act that it prohibits the use of the licensed premises at certain times for cinematograph exhibitions even with non-inflammable films, nor that, the licence being limited to certain days of the week, the condition prohibits the use of the premises for such exhibitions on a day to which the licence does not extend.

Case stated by justices of Middlesex.

The respondents, the North Metropolitan Theatres, Limited, were summoned upon an information charging that they, being the occupiers of premises known as the Canadian Rink Cinema, High Road, Tottenham, in contravention of the conditions subject to which the licence relating to the premises was granted under the Cinematograph Act, 1909 (1), opened the premises for a cinematograph exhibition on Sunday, August 9, 1914.

(1) The Cinematograph Act, 1909, is entitled "An Act to make better provision for securing safety at cinematograph and other exhibitions."

By s. 1, "An exhibition of pictures or other optical effects by means of a cinematograph, or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or, save as otherwise expressly provided by this Act, elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act."

By s. 2, sub-s. 1, "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to the regulations of the Secretary of State, the council may by the respective licences determine."

By s. 3, "If the occupier of any premises allows those premises to be used in contravention of the provisions of this Act or the regulations made thereunder, or of the conditions or restrictions upon or subject to which any licence relating to the premises has been granted under this Act," he is to be liable to a penalty.

1915

ELLIS v. NORTH METROPOLITAN THEATRES.

At the hearing of the information the following facts were proved :—

The respondents were on August 9, 1914, the occupiers of the said Canadian Rink Cinema. In respect of such premises a licence had been granted by the county council of Middlesex on November 10, 1913, under the Cinematograph Act, 1909, to one William Evans on behalf of the respondents, "to keep and use on each weekday, except Christmas Day and Good Friday, or any day of solemn fast and humiliation," the said premises "for public cinematograph or other similar exhibitions to which the Cinematograph Act, 1909, applies . . . . upon the following conditions :— . . . . 3. That the licensee do not presume to open the said licensed premises or any part thereof for cinematograph or other similar exhibitions on the Lord's Day (commonly called Sunday), nor on Christmas Day, Good Friday, nor on any day of fast and humiliation which now is or hereafter shall be by lawful authority appointed." By another condition (No. 4) the licensee was required to observe, carry out, and comply with the regulations made by the Secretary of State under the above Act, which regulations apply to buildings used for cinematograph or other similar exhibitions to which the said Act applies. By condition 6, "In the event of any alterations being made in the licensed premises or the enclosure in which the cinematograph apparatus is placed, or in the apparatus, without the sanction of the licensing committee, this licence will be revoked by the licensing committee." On Sunday, August 9, an exhibition of pictures was being given at the said premises by means of cinematograph apparatus before a considerable audience who had paid for admission. The films used for the purpose of such exhibition on the said August 9 were non-inflammable films.

It was contended by the respondents that the Cinematograph Act, 1909, had no application to exhibitions of pictures by cinematograph apparatus where the films used in connection therewith were of a non-inflammable character; that the power given to a county council by s. 2 to attach conditions to a licence granted under the Act extended only to licences for exhibitions where inflammable films were used; and that condition 3 attached to the respondents' licence was ultra vires as it extended to prohibit

cinematograph exhibitions other than those dealt with by the Act.

For the appellant it was contended that if the occupier of premises used for cinematograph exhibitions took advantage of a licence he was subject to its conditions, provided they were lawful ones, and that condition 3 was a lawful condition which it was intra vires the county council to impose.

The justices were of opinion that condition 3 in so far as it prohibited cinematograph picture exhibitions with non-inflammable films was ultra vires, and was not such a condition as was contemplated by s. 2, and therefore no breach of s. 3 had been committed. They accordingly dismissed the information.

Disturnal, K.C., *Wrottesly*, and *Thursfield*, for the appellant. Condition 3 was not ultra vires. If the respondents had confined themselves to the use of the premises for exhibitions with non-inflammable films they need not have had a licence at all, but as they chose to take out a licence to use them for exhibitions with inflammable films they are bound by the conditions requiring them not to use the premises on Sundays for cinematograph exhibitions of any kind irrespective of the class of films used. The regulations which the Secretary of State may make under s. 1 of the Cinematograph Act, 1909, are no doubt limited to regulations for securing safety in view of the fact that inflammable films are intended to be used on the premises. But the conditions which the county council may attach to the grant of a licence under s. 2 are not subject to any similar limitation. The language is perfectly general—"on such terms and conditions and under such restrictions as . . . . the council may . . . . determine." The only limitations on the conditions imposed by them are that they must be reasonable, and that they must have reference to the use of the premises by the licensee. The case states that at the exhibition complained of the audience had paid for admission; and by the Sunday Observance Act, 1781 (21 Geo. 3, c. 49), a house opened for public entertainment on a Sunday to which admission is by payment is to be deemed a disorderly house, and the keeper of it is liable to prosecution. A condition cannot be regarded as unreasonable which only requires

1915

ELLIS v. NORTH METROPOLITAN THEATRES.

the licensee to obey the existing law. In *London County Council* v. *Bermondsey Bioscope Co.* (1) a condition that the premises should not be opened under the licence on Sundays, Good Friday, or Christmas Day was held to be valid. In *Theatre de Luxe* (*Halifax*) v. *Gledhill* (2) a condition that children under fourteen years of age should not be admitted after 9 P.M. if unaccompanied by a parent or guardian was held to be ultra vires upon the ground that the prohibition which the Act contemplated might be imposed by conditions attached to the licence was a prohibition of the user of the premises in a particular manner by the licensee, whereas the user there prohibited by the condition was a user not by the licensee but by third persons, children who came to see the exhibition. That case affords no support to the respondents, for here the user prohibited was that of the licensee.

It is not competent for the respondents to contend that the licence which attaches to their premises for six days in the week does not also attach on the Sunday. By obtaining a licence for their premises they acquired the reputation of safety which the grant of such a licence confers, and they cannot by using the premises for a purpose for which a licence is not required suddenly detach the licence and contend that they are not using them under the licence.

Macmorran, K.C., and *Bodkin*, for the respondents. The licence which the county council are empowered by s. 2 to grant is a licence "to use the premises specified in the licence for the purposes aforesaid." Those purposes, as appears from s. 1, are the purposes of an exhibition of cinematograph pictures by means of inflammable films. It is only where inflammable films are used that the licence has any application, and where no licence is necessary no conditions can be imposed. It may be that the conditions which the county council may impose on the grantee of a licence are wider than the title of the Act would suggest, and are not confined to provisions for securing safety, but they must at least have reference to the use of the premises "for the purposes aforesaid." In the *Bermondsey Case* (1) inflammable films were being used at the time of the breach of condition complained

(1) [1911] 1 K. B. 445. (2) Ante, p. 49.

1915

ELLIS v. NORTH METROPOLITAN THEATRES.

of. Moreover the licence in that case was a seven-day licence; the condition was that the premises should not be "opened under the licence on Sundays," which implied that but for the condition the licence would have extended to Sunday, whereas here the licence is only a six-day licence, and it is not competent to the council to impose a condition applicable only at a time to which the licence does not extend. In *Rossi* v. *Edinburgh Corporation* (1), where, a local Act having prohibited the sale of ice cream except in premises licensed for the purpose, the local magistrates granted a licence subject to the condition that the licensee should "not keep open the said premises or sell or permit the sale of ice cream therein on Sunday," the condition was held by the House of Lords to be ultra vires upon the ground that it prohibited the licensee from keeping open his premises for a purpose for which a licence was not required. So here the condition prohibits the opening of the premises for a cinematograph exhibition on Sunday even though the visitors may have been admitted without payment, and though consequently no offence would have been committed under the Sunday Observance Act, 1781. If the appellant is right the condition would prevent the respondents from using the premises for a gratuitous Sunday school lecture if it was illustrated by non-inflammable films.

RIDLEY J. In this case we are all of opinion that the decision of the justices was erroneous. The respondents were the occupiers of certain premises used for cinematograph exhibitions, and they were found to have been using them for an exhibition on a Sunday, though on that occasion the exhibition was given by means of non-inflammable films. Under those circumstances they were summoned for a breach of one of the conditions of the licence granted to them in respect of the premises under the Cinematograph Act, 1909, the condition being that they should not use the premises for such an exhibition on a Sunday. The justices held that a condition prohibiting the use of the premises for an exhibition at which non-inflammable films were used was ultra vires, and they dismissed the information. No doubt at first sight it would appear as if that view was correct, for the

(1) [1905] A. C. 21.

1915

ELLIS v. NORTH METROPOLITAN THEATRES.

Ridley J.

Act is entitled "An Act to make better provision for securing safety at cinematograph and other exhibitions," and s. 1 provides that "An exhibition of pictures . . . . by means of a cinematograph for the purposes of which inflammable films are used shall not be given unless the regulations made by the Secretary of State for securing safety are complied with." But when the Act is examined with attention it is seen that though the immediate object of the Act was to ensure the safety of the entertainments where inflammable films were used, that was by no means its only object. By s. 2, "A county council may grant licences to such persons as they think fit to use the premises . . . . for the purposes aforesaid." I pause there, and I agree that it is difficult to read those words "for the purposes aforesaid" in a different sense from that in which they are used in s. 1. I think they mean that the licence is to be for the use of the premises for cinematograph exhibitions with inflammable films. Then the section goes on "on such terms and conditions and under such restrictions as . . . . the council may by the respective licences determine." It was argued that the conditions which may be so imposed must have a connection with the use of inflammable films. With that I do not agree. I think that they must have reference to the use of the premises, but not necessarily to the use of them for exhibitions with inflammable films. Indeed the decision in *London County Council* v. *Bermondsey Bioscope Co.* (1) seems directly opposed to such a contention. It is true that in that case the films actually used were inflammable films, so that the point here raised did not directly arise, but the Court certainly decided that a condition similar to that which we have to deal with here was a good condition. So long as the conditions imposed are not unreasonable and have relation to the use of the premises it seems to follow from that decision that they are valid and must be obeyed by the party who accepts the licence. Then it was further argued for the respondents that a condition could not be imposed which was to operate only at a time when the licence did not operate, and that as the licence here was in terms only a six-day licence a condition as to what was to be done on Sunday could not be valid. That contention also I think cannot be supported.

(1) [1911] 1 K. B. 445.

That it is unsound seems to follow from the decision to which I have already referred.

BRAY J. I am of the same opinion. The respondents were charged with having used their premises for a cinematograph exhibition on a Sunday in breach of a condition of their licence which required "that the licensee do not presume to open the said licensed premises or any part thereof for cinematograph or other similar exhibitions on the Lord's Day." The first question to be determined is what that condition means. I am satisfied that it means to prohibit the opening of the premises for such exhibitions on Sunday whether inflammable films are used or not. It follows therefore that the condition was broken. The next question is whether the condition is a valid one. I agree that the decision in the *Bermondsey Case* (1) is not conclusive upon that point; for it did not appear there that the licence was only a weekday licence, and indeed the words of the condition suggested the contrary, "that the premises be not opened under the licence on Sundays." That left it open to Mr. Macmorran to raise the ingenious contention that as the licence was a week-day licence and did not include Sunday therefore there could be no conditions with reference to Sunday. In my opinion that contention is not sound. In the first place the words of the Act do not impose any such restriction on the conditions. Sect. 2 says that the council may grant the licence on such terms and conditions as they may determine. In the previous section the Secretary of State is only allowed to make regulations for the purpose of securing safety. But in s. 2 there are no restrictions upon the nature of the conditions which the council may impose. In my opinion it is very important that there should be power to impose conditions with regard to Sunday as well as with regard to other days, whether they deal with the question of safety or not; and condition 6 of this licence is a very good illustration: "that in the event of any alterations being made in the licensed premises or the enclosure in which the cinematograph apparatus is placed, or in the apparatus, without the sanction of the licensing committee, this licence will

(1) [1911] 1 K. B. 445.

1915

ELLIS v. NORTH METROPOLITAN THEATRES.

Bray J.

be revoked by the licensing committee." Therefore if an alteration were made on Sunday that would be a breach of that condition. I can see no reason for restricting the conditions in the manner contended for. We have been referred to a case of *Theatre de Luxe* (*Halifax*) v. *Gledhill* (1), where a condition, that children under fourteen years of age should not be allowed upon the licensed premises after 9 P.M. unless accompanied by their parent or guardian, was held to be ultra vires. The ground upon which the Court there proceeded was that s. 3, which makes it an offence in the occupier of the licensed premises to allow them to be used in contravention of the conditions on which the licence was granted, was dealing with conditions which affect the user of the premises by the licensee, and that a condition which restricted their use not by the licensee but by visitors of a tender age was not within the Act and was invalid. Whether the majority of the Court in that case were right in so deciding it is not for us to say, for we are bound by their decision, but here there is no question that the condition is one which affects the user by the licensee; therefore that case does not touch the present one. On the other hand the language of Lord Alverstone in the *Bermondsey Case* (2) does seem to cover it. He said at p. 451: "In my opinion that section"—that is s. 2—"is intended to confer on the county council a discretion as to the conditions which they will impose, so long as those conditions are not unreasonable." To my mind that was the real ground of the decision in that case, and if the condition before the Court there was reasonable it must equally be reasonable here. The ground on which it was held to be reasonable was that it only had the effect of requiring the licensee to observe the provisions of an existing statute.

ATKIN J. I agree. The conviction here is under s. 3 of the Cinematograph Act, 1909, and the scheme of the Act is this: By s. 1 an exhibition of pictures for which inflammable films are used can only be given on premises that are licensed in pursuance of the Act. There is no prohibition in the Act against giving exhibitions of pictures for which non-inflammable films

(1) Ante, p. 49. (2) [1911] 1 K. B. 445.

are used. But in the licence to use the inflammable films the licensing authority may by s. 2 impose such conditions and restrictions as they think fit. Then s. 3 provides a penalty both for giving an exhibition of inflammable films without a licence, and for infringing the conditions of the licence under which premises may be used for the purposes of an exhibition of inflammable films. The question is whether the county council may impose conditions which have the effect of preventing the use of premises, that are licensed for the exhibition of inflammable films, for exhibitions of non-inflammable films. I agree that there is no restriction upon the power of the licensing authority which prevents them from imposing such a condition as this, which does in fact prohibit the giving of exhibitions of non-inflammable films on certain days. I have been anxious in this case not to depart in any way from the judgment in the *Halifax Case* (1), in which I gave a dissenting judgment, but I think for the reason given by my brother Bray that the decision in this case does not violate the restriction which the Court there thought ought to be imposed upon the powers of the licensing authority. The contention of the respondents in this case was a perfectly logical one, that the licensing authority has no power to impose any restrictions upon the user of the premises at any time during which the licence to use inflammable films was not operative. That is a plain contention, and if it were sound it would establish their case, but to my mind there is no such limitation to be found in the Act, and I think there are ample reasons why such a limitation should not be imposed. I think the justices here ought to have convicted, and the case must go back to them with directions to that effect.

Appeal allowed.

Solicitors for appellant: *Nicholson, Patterson & Freeland.*

Solicitors for respondents: *Macdonald & Stacey, for A. Willey, Leeds.*

(1) Ante, p. 49.

J. F. C.

1914
Dec. 11.

STRATFORD CO-OPERATIVE SOCIETY, LIMITED *v.* EAST HAM CORPORATION.

Master and Servant (Infants)—Unlawful Employment of Boy under Sixteen Years of Age—By-law—"Street trading" without wearing Badge—Employment of Children Act, 1903 (3 *Edw.* 7, *c.* 45), *s.* 2.

By s. 2 of the Employment of Children Act, 1903, "any local authority may make by-laws with respect to street trading by persons under the age of sixteen and may by such by-laws . . . . require such street traders to wear badges":—

Held, that a person may be engaged in street trading within the meaning of the section although he is not trading on his own account but is in the employment of another person.

A by-law made under the section by the respondents, the Corporation of East Ham, provided that no boy under sixteen should "be employed in or carry on street trading" unless he wore a badge.

The appellants, a co-operative and industrial society, carried on, inter alia, the business of bakers, and had a number of establishments where they sold goods. By their servants they called at certain periods on members of the society at their houses and supplied them with their goods from vans, each of which was in charge of a vanman and a boy. One of the boys was between fourteen and sixteen years of age and was in the employment of the appellants at a weekly wage. He called at the house of a member of the society who was called upon daily. He had a basket of bread taken from the van. He knocked at the door, which was opened by the member, who asked for two loaves, for which she paid him 6*d*. He handed the money to the vanman. When he went to the house he did not know how many loaves the member would buy, or if she would buy any.

The vanman and boy were also permitted to sell in a similar manner to persons who were not members of the society at their own houses any bread which was left over after all the requirements of members of the society had been met. The boy would have sold bread to persons other than members of the society had he been asked to do so by them, but in fact he had never done so. He did not wear a badge.

The appellants having been convicted by a magistrate for unlawfully employing the boy in street trading without his wearing a badge contrary to the by-law:—

Held by Lush and Rowlatt JJ. (Atkin J. dissenting), that the conviction was wrong, for s. 2 of the Employment of Children Act, 1903, read together with the definition of street trading contained in s. 13, indicated that the statute prohibited trading and seeking customers in the street where the street was used as a market place, and did not prohibit legitimate business between a shop and customers in their houses.

1914

STRATFORD CO-OPERATIVE SOCIETY, LIMITED v. EAST HAM CORPORATION.

Per Atkin J.: The Employment of Children Act, 1903, was intended to benefit children in the sense of protecting them from the danger of frequenting the streets. There was ample evidence that the boy was engaged in street trading, and it was not necessary to prove a sale in the street to passers-by.

CASE stated by the stipendiary magistrate for the borough of East Ham.

On March 19, 1914, an information was preferred by the respondents, the East Ham Corporation, against the appellants for that they on February 9, 1914, in the borough of East Ham did unlawfully employ a certain child named James Mealand in street trading, to wit, selling bread, without his wearing a street trading badge, contrary to a certain by-law made by the council of the borough under the authority of the Employment of Children Act, 1903. Upon the hearing of the information the following facts were proved or admitted.

The appellants were a co-operative and industrial society incorporated under the Industrial and Provident Societies Acts. They carried on, inter alia, the business of bakers, and had a number of establishments in and upon which they sold goods. They also by their servants called daily or at periodical times as might be arranged on customers at their own houses, those customers being members of the society, and supplied them with what they required from vans belonging to the society containing goods, each van being in charge of a vanman assisted by a vanboy. The appellants through their vanman and vanboy were also open to sell in a similar manner any bread which was left over, after all the requirements of members of the society had been satisfied, to persons not members of the society at their own houses.

James Mealand, a vanboy, was at all material times in the employment of the appellants at a weekly wage. He was above fourteen and under the age of sixteen years and exempt from school attendance. On February 9, 1914, he was assisting the vanman in charge of the van in the business of the society. In pursuance of the course of business Mealand called at a house in East Ham which was in the occupation of a lady, a member of the appellant society, who was called upon daily. He had a basket with bread in it taken from the van. He knocked at the

1914

STRATFORD CO-OPERATIVE SOCIETY, LIMITED v. EAST HAM CORPORATION.

door. The member opened the door and asked for two loaves, with which Mealand supplied her from the loaves in his basket. The member paid him 6*d.* for the two loaves, for which Mealand gave her a receipt and subsequently handed the money to the vanman, whose duty it was to pay it over to the appellants. Mealand did not know when he went to the house how many loaves the member would buy or whether she would buy any. He went to the house every day to supply bread and never knew till he got there whether any loaves would be required. He had several other customers members of the society to whom he supplied bread in the same way. Sometimes they would take a loaf or loaves, sometimes none. He never knew before he arrived at the house how many loaves or whether any would be required. Though Mealand would have sold bread to persons other than members of the society had he been asked by them to do so, yet as a fact he had never sold to persons who were not members thereof. The council of the borough of East Ham had made by-laws pursuant to the provisions of ss. 1 and 2 of the Employment of Children Act, 1903 (1), regulating (*a*) the employment of children generally and (*b*) street trading by persons under the age of sixteen years within the borough of East Ham.

(1) Employment of Children Act, 1903 (3 Edw. 7, c. 45), ss. 1 and 13, empower any local authority to make by-laws regulating the employment of children, i.e., persons under the age of fourteen years.

Sect. 2: "Any local authority may make by-laws with respect to street trading by persons under the age of sixteen and may by such by-laws—

"(*a*) prohibit such street trading, except subject to such conditions . . . . as may be specified in the by-law . . . .

"(*c*) determine the days and hours during which, and the places at which, such street trading may be carried on;

"(*d*) require such street traders to wear badges; . . . ."

Sect. 4, sub-s. 1: "A by-law made under this Act shall not have any effect until confirmed by the Secretary of State . . . ."

Sect. 5, sub-s. 1: "If any person employs a child or other person under the age of sixteen in contravention of this Act or of any by-law under this Act, he shall be liable on summary conviction to a fine . . . ."

Sect. 13: "The expression 'street trading' includes the hawking of newspapers, matches, flowers and other articles, playing, singing or performing for profit, shoe-blacking and any other like occupation carried on in streets or public places."

The by-laws so made for regulating street trading included the following one, the alleged breach of which was the subject of the information: "No boy under the age of sixteen years shall at any time be employed in or carry on street trading unless:—

"(1.) He is exempt from school attendance; and

"(2.) He first procures a badge from the borough council which he shall wear whilst engaged in street trading on the upper part of the right arm in such a manner as to be conspicuous.

"The badge shall be deemed a licence to trade."

The magistrate was of opinion that Mealand was employed in street trading within the meaning of the Act of 1903 and the by-law, and that the by-law was valid, and he accordingly convicted the appellants. The question for the opinion of the Court was whether the magistrate came to a correct decision in point of law.

Gordon Hewart, K.C., and *Morle*, for the appellants. The boy Mealand was not carrying on street trading within the meaning of the by-law. The by-law only refers to an independent carrying on of some trade or business in the street, such as hawking flowers or newspapers, where the boy carries on his own little business in the street.

But even if the boy had been acting as a principal he would not have been carrying on "street trading." Although the definition contained in s. 13 of the Employment of Children Act, 1903, says that the definition "includes" the occupations it refers to, it is exhaustive. It enumerates the whole category of street traders. The facts in *Philpott* v. *Allright* (1) were curiously like those in the present case, and that case is in favour of the appellants. The expression "hawking" in the definition of "street trading" in s. 13 of the Act of 1903 is not synonymous with the occupations mentioned in the definition of "hawker" contained in s. 2 of the Hawkers Act, 1888 (51 & 52 Vict. c. 33), which must be read subject to the exemptions in s. 3, sub-s. 3, of that Act. That statute is a revenue statute. If goods have to be ordered and delivered at a house, it is not street trading within the meaning of the definition in the Employment of Children Act, 1903, and

(1) (1906) 4 L. G. R. 1013.

1914

STRATFORD CO-OPERATIVE SOCIETY, LIMITED v. EAST HAM CORPORATION.

the by-law. The boy only used the street for the purpose of getting to the houses of his customers. The street was not the place of his operations. The object of s. 2 of the Act of 1903 is the identification of the boy. The badge secures control over him.

[It was also contended that by the terms of the by-law the provisions contained in s. 1 and s. 2 of the Act of 1903 were confused and that therefore the conviction could not be supported, but as the Court expressed no opinion upon this point it is not considered necessary to set out the argument upon it at length.]

A. H. Bodkin, for the respondents. Sect. 2 of the Employment of Children Act, 1903, relates to persons under the age of sixteen, and s. 5, sub-s. 1, makes it an offence to employ a person under the age of sixteen in contravention of the Act or of any by-law made thereunder. It is therefore an offence under s. 2 to employ a person under sixteen in street trading without his wearing the badge required by the by-law. *Philpott* v. *Allright* (1) is distinguishable. That case only related to the collection of so many dues as were maintainable. In the Employment of Children Act, 1903, the expression "hawking" in s. 13 gives an extended meaning to street trading and is not meant to be the technical hawking referred to in the Hawkers Act, 1888, but selling in the street or taking part in it, by one of the persons for whose benefit the Act of 1903 was passed, whether for his own benefit or when he is employed by some other person. Under the conditions of the licence granted under s. 2 the days, hours, and places at which street trading may be carried on and the conduct of street traders generally may be regulated by by-laws. The Act of 1903 was only passed after the very important public inquiry by the Employment of School Children Committee, 1901, mentioned in Lumley's Public Health Act, 8th ed., vol. ii., p. 2371, had taken place. The by-law has been confirmed by the Secretary of State under s. 4 of the Act of 1903. Parliament has approved of boys and girls engaged in street trading wearing the badges in order to distinguish them from other boys and girls in the street. "Street trading" must be construed to include a person engaged in street trading whether acting on his own behalf or employed

(1) 4 L. G. R. 1013.

by others. By s. 13 "the expression 'employ' and 'employment,' used in reference to a child," i.e., a person under fourteen years of age, "include employment . . . . whether the gain be to the child or to any other person," and the expressions have an analogous meaning when used in reference to other persons older than fourteen. The boy was paid by the appellants, and to send him out without a badge was a contravention of the by-law and the Act of 1903. The object of the Act is to control young persons, and s. 2 read together with the definition of "street trading" in s. 13 deals with young persons engaged in trading as well as with others not so engaged, e.g., performers and shoeblacks. [*O'Dea* v. *Crowhurst* (1), *Pletts* v. *Campbell* (2), *Pletts* v. *Beattie* (3), and the definition of "pedlar" in s. 3 of the Pedlars Act, 1871 (34 & 35 Vict. c. 96), were also referred to.]

Gordon Hewart, K.C., in reply. The substantial question is whether "street trading" includes going into or through a street for the purpose of doing business, as distinguished from making the street the actual market place. It is not desired to further press the contention that the fact that the boy was employed by the appellants is material, and it must be admitted that, if what the boy did was street trading within the meaning of the Act of 1903 and the by-law, the fact that he was employed by the appellants makes no difference. In order to be street trading the street must be made the market place—the very place where the business is carried on. The decision in *O'Dea* v. *Crowhurst* (1) turned upon the meaning of hawking within the Hawkers Act, 1888. It does not bind this Court and ought not to be followed.

LUSH J., having stated the facts, continued: There is nothing to indicate that the appellants employed the boy to do anything more than I have mentioned, namely, to go round with the van-man and deliver to customers who were members of this society. Upon that it was contended before the magistrate on behalf of the respondents, the East Ham Corporation, that the appellants had committed an offence against the by-law which had been framed under this statute, and it was said that the provisions of

(1) (1899) 63 J. P. 424. (2) [1895] 2 Q. B. 229.
(3) [1896] 1 Q. B. 519.

1914

STRATFORD CO-OPERATIVE SOCIETY, LIMITED v. EAST HAM CORPORATION.

Lush J.

the Employment of Children Act 1903 itself, had been infringed by what was done by the appellants. The magistrate took the view that there had been an infringement of the Act, and convicted the appellants upon the ground that by employing the boy they were doing what the Act prohibits, namely, unlawfully employing the boy in street trading, he being under the age of sixteen. It is not necessary to refer specifically to the by-laws; there has been a question raised as to whether the particular by-law confuses ss. 1 and 2 of the Act. I do not think it is necessary to deal with that question, because one can deal with this case upon the footing that the magistrate has held upon the facts that this boy was engaged in street trading, and that the appellants had employed him to carry on business as a street trader. The question in substance is whether that view is right. If the appellants did employ him to carry on business as a street trader, it seems to me quite clear that they could be convicted, and that s. 2 of the Act is not confined, as Mr. Gordon Hewart at the beginning of his argument for the appellants suggested it was, to the case of a boy under sixteen carrying on the business of street trading on his own account. By s. 5, sub-s. 1, of the Act it is enacted that "If any person employs a child or other person under the age of sixteen in contravention of this Act, ... he shall be liable on summary conviction" to a fine. Mr. Gordon Hewart quite properly abandoned his original contention that the boy must be trading on his own account, and the only question remaining is whether what was done was carrying on street trading within the meaning of s. 2 of the Act. Sect. 13 defines or interprets the expression "street trading" as including "the hawking of newspapers, matches, flowers and other articles, playing, singing or performing for profit, shoe-blacking and any other like occupation carried on in streets or public places." I quite agree that that definition of street trading is not exhaustive. Street trading may include similar instances of hawking, and doing things ejusdem generis with those that are mentioned in s. 13; but the section appears to me to indicate that the trading which is prohibited and called "street trading" is a real trade in the street in this sense, that it must be a trading and seeking of custom in the street. If a boy under sixteen

goes on his own account, or is sent by an employer, into the street to make that street a place where he solicits custom and finds his customers, an offence has been committed against the Act or the by-laws made under it. It seems to me from the terms of the statute that the mischief intended to be obviated was that of boys being sent out to loiter in the street and being exposed to all the dangers and drawbacks which trading in the street exposes a boy to. There he is without any definite place of business—there is no shop in which he is employed—and it is that class of trading which I think this Act was intended to check and which public bodies were intended to restrict by proper by-laws. But in my judgment the essence of the present case, upon the facts stated by the magistrate, was that the boy was carrying on a legitimate business between the shop and the customers in their private houses. If he had been sent merely to the houses of members of the society in the morning with a message asking what bread they required that day, and had then gone back and had delivered the bread on a second visit, it seems to me that it would have been impossible to have successfully contended that he was engaged in street trading. Is it any the more street trading because for convenience the whole operation takes place at one visit? In my opinion this was not street trading. It does not fall within the terms of s. 2 of the Employment of Children Act, 1903, and in my judgment the appeal ought to be allowed.

Rowlatt J. I am of the same opinion. The boy was engaged in connection with a bakery, to take the bread round and ask the customers of the bakery how much bread they wanted, and if he liked, and he had bread enough, to ask other persons at their houses how much bread they wanted, and leave the bread on receiving an answer. I do not gather that it is intended that this case is to be treated upon the footing that the boy was offering or would sell bread to passers-by in the street. Now, in those circumstances, was he engaged in street trading, either using that phrase simpliciter or having regard to the light which is thrown upon it by the definition clause contained in the Employment of Children Act, 1903? In my judgment he was not. I think "street trading" means trading with customers

1914

STRATFORD CO-OPERATIVE SOCIETY, LIMITED v. EAST HAM CORPORATION.

Rowlatt J.

found in the street—with customers whose resort is the street—the trader using the street as a market place, and not trading with customers whom he finds at their houses, to arrive at which he necessarily had to pass through the street. It was contended on behalf of the respondents that the objects of the Employment of Children Act, 1903, and the evil that it was intended to remedy must be looked at, and that that evil was the frequenting of the streets by children—a practice that we all know very often leads to sad results. But if so wide an object as that was to be attained, why should the enactment be limited to trading? I think the dividing line ought to be drawn in the position I have indicated for this reason. If a child is sent out to sell things in the street to passers-by, to seek for customers in the street, or to exhibit his skill in any performance in the street, or to loiter there and to attract the attention of other persons loitering in the street, he incurs a danger which may well be differentiated, as being of a more serious character, from the danger of a child falling into temptation when he is going a definite round from house to house through a street or series of streets, upon a definite round with a definite object in view. I therefore think that by drawing the line where we draw it by our decision a tangible and sensible point of differentiation in the class of circumstances is arrived at. I agree that this appeal ought to be allowed.

ATKIN J. I am sorry to say that I differ from my brothers in the conclusion at which I have arrived in this case. Two points were taken by the appellants. One was eventually abandoned. I think it is advisable to refer to it. It was contended that s. 2 of the Employment of Children Act, 1903, which provides that a "local authority may make by-laws with respect to street trading by persons under the age of sixteen and may . . . . prohibit such street trading," only gave the local authority power to prohibit street trading by a boy or girl under the age of sixteen where the boy or girl was acting in fact as principal in the trading—trading, in other words, for his or her own profit—and not where the boy or girl was employed to trade for the benefit of another person. That contention is in my view, and I think in the view

of all the members of the Court, untenable, and was in fact withdrawn by counsel on behalf of the appellants.

But there arises the question as to whether or not the facts in this case show that the boy was employed in street trading, and for this purpose it has to be remembered that there is a distinction between s. 1 of the Act of 1903, which provides that the local authority may by by-laws regulate the employment of children, that is to say, boys or girls under fourteen years, in any occupation wherever conducted, and s. 2, which provides that the local authority may make by-laws regulating the employment of persons whom for this purpose it will be convenient to call young persons (in order to distinguish them from children, though I know that the expression "young persons" is used in another connection), that is persons under sixteen years of age, in respect of street trading. There can be no doubt that the Employment of Children Act, 1903, was intended for the benefit of children, boys and girls of tender years, to protect them from the danger of frequenting the streets for the purpose of gaining either their livelihood or the livelihood of those who employ them; and the statute has given power to the local authority to make by-laws to prohibit street trading, subject to certain conditions. What is the meaning of street trading? First, one has to form an idea of what is meant by trading, and I should understand trading to mean selling wares—involving finding a purchaser and entering into and completing a contract of sale of the wares—and it appears to me that if a young person is employed to perform that operation or the substantial part of it in the street, he is employed in street trading. If that is what is meant by street trading I think that there was ample evidence upon which the learned magistrate could find that that offence had been committed. The facts are that the boy was employed to go out with a van which was driven by a man. The man and the boy went out, the boy took a basket of loaves which he had taken from the van, went to the door of the customer, knocked at the door, and the member having opened the door asked for two loaves, with which the boy supplied her from the loaves in his basket. The person was a member of the society and had bought bread from the society before, but at the time

1914

STRATFORD CO-OPERATIVE SOCIETY, LIMITED v. EAST HAM CORPORATION.

Atkin J.

this boy and this van were sent out they were sent out to call at houses of persons who had been purchasers of bread before, but whom they did not know, when they started out, would be purchasers of bread again. In that sense they were customers, but the man and boy had to find them as customers for the bread, and they called at the houses and offered their wares to the persons from time to time who had bought goods before. There was no evidence that at any time the boy left the street. It is consistent with the evidence that everything which he did was performed and properly performed in the street; therefore, even if it were necessary to show that the whole operation took place in the street, I think there is ample evidence on which the magistrate could so find, and I think myself that he has so found. It appears to me that the view taken by the other members of the Court that street trading involves selling wares to passers-by in the street would have this effect: that the young persons could be employed at any hour in any place (because no restrictions could be made) to take and offer goods from house to house, provided they did not offer the goods to anybody whom they met in the street—to the passers-by. I cannot distinguish that case from the present case where the man and boy—though it is true they called at houses where the persons had bought bread before—did not know at the particular moment whether they were going to buy bread on this particular occasion or not. There is the further evidence that the boy was open to sell bread to persons who were not customers, and I should gather that the magistrate had evidence before him that the boy was authorized so to deal, and being authorized so to deal that he was in fact employed to sell bread to people who had not bought bread before from this particular shop. That in my view would amount to evidence upon which the magistrate could find that the appellants were guilty of an offence against the by-law. I think that the view that has prevailed in this Court very seriously limits the beneficial operation of this statute. In my opinion it was not necessary so to hold. I think the words are quite large enough to support the view to which I have tried to give expression, which having regard to the nature of the Act, and its construction as a whole,

I think is the ordinary and proper interpretation that ought to be given to s. 2; but as the view which I am expressing is not shared by the other members of the Court, the result will be that the appeal will be allowed.

1914

STRATFORD CO-OPERATIVE SOCIETY, LIMITED v. EAST HAM CORPORATION.

Appeal allowed.

Solicitors for appellants: *Prestons, Stratford.*
Solicitors for respondents: *Wilson & Son.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.

1915

Jan. 20, 21.

HERBERT *v.* SAMUEL FOX & CO., LIMITED.

Employer and Workman—Compensation—Injury by Accident—Arising "out of" the Employment—Prohibited Act—Sphere of Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman employed as a shunter upon his employers' private railway was injured by accidentally falling from the buffer of a waggon upon which he was improperly riding. His duty when waggons were being moved was to walk in front of them and keep a look-out, and a notice to that effect, of which the man was aware, was posted on the employers' premises. On the occasion of the accident, at the conclusion of some shunting operations, four waggons were being pushed by an engine towards the engine shed, when the workman, instead of walking in front of the train, climbed upon the buffer of the leading waggon and sat there until he fell upon the line and was run over and injured. Upon a claim for compensation under the Workmen's Compensation Act, 1906:—

Held (Phillimore L.J. dissenting), following *Barnes* v. *Nunnery Colliery Co.* [1912] A. C. 44 and *Plumb* v. *Cobden Flour Mills Co.* [1914] A. C. 62, that the accident did not arise "out of" the employment. The claimant by his conduct had exposed himself to a risk which, by express prohibition, was placed outside the sphere of his employment, and he was not, therefore, entitled to compensation.

Chilton v. *Blair & Co.* [1914] W. N. 290, 7 B. W. C. C. 607, distinguished.

APPEAL from an award of the judge of the Sheffield County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, a boy of nineteen years of age, was employed by the respondents as a railway shunter on a private line

C. A. 1915

HERBERT v. SAMUEL FOX & CO., LIMITED.

connecting their works with the Great Central Railway. On January 17, 1914, he met with an accident which resulted in injuries necessitating the amputation of both his legs. In respect of this accident he claimed compensation from the respondents.

According to his own evidence, which was taken on commission, on the day of the accident he was engaged in shunting up till 12.30, when the work was discontinued. The engine had then to be taken to the engine shed, which was distant about three-quarters of a mile from the place where the shunting had been in progress. On its journey to the shed the engine had to pick up any loose waggons on the road and take them back to the shed. On the occasion in question four trucks were so picked up and pushed in front of the engine, which was travelling tender first. A notice in the following terms was put up on the employers' premises: "When railway waggons are being moved by hand or by engine a look-out man must be in front of the waggons. Any person not obeying this order will be instantly dismissed. By order of the Works Manager." The applicant was acting as look-out man. His proper duty was to walk in front of the waggons and keep a look-out. Some of the waggons were high sided. The front one of the four which was being pushed by the engine was high sided. Instead of walking in front of the waggons, he climbed on to the right-hand buffer of the leading waggon and sat there, supporting himself in that position by the aid of his shunting pole. He was sitting sideways with his legs hanging over the right side of the line. He had hold of his shunting pole with both hands. The end of the pole was under the drawbar of the waggon and the pole itself was resting on the top of the right-hand buffer. The pole slipped and he fell off the buffer with his legs across the rail, and the train ran over them. He admitted in the course of his evidence that his proper duty was to walk in front of the waggons and keep a look-out, that he had no business to ride on the buffer, and that any one seen doing so by the manager would be dismissed.

The county court judge held on the evidence that the accident arose in the course of and out of the employment, distinguishing

the case from *Plumb* v. *Cobden Flour Mills Co.* (1); and he awarded compensation to the applicant.

The employers appealed.

T. E. Ellison, for the appellants (employers). The decision of the county court judge was wrong. The present case is covered by *Barnes* v. *Nunnery Colliery Co.* (2) and *Plumb* v. *Cobden Flour Mills Co.* (1) The workman by riding on the buffer of the truck was doing an act of direct disobedience to the notice posted upon the respondents' premises. His duty was to walk in front of the trucks and keep a look-out. By riding on the buffer he was doing something entirely different from that for which he was employed and which was not reasonably incidental to the performance of his employment.

The case is analogous to the Scottish case of *Revie* v. *Cumming.* (3) In that case it was the duty of a brakesman to walk behind a lorry to apply the brakes when directed to do so by the driver. In disobedience to the rule, of which he was fully aware, he rode on the lorry beside the driver. In jumping off to apply the brakes he fell and was injured and it was held that the accident did not arise out of the employment.

H. T. Waddy, for the respondent. The finding of the county court judge ought not to be disturbed. It is not every departure from rules which will be regarded as taking the workman out of the scope of his employment. The test is whether the added peril was incurred by the workman in order to further his master's interest: *Price* v. *Tredegar Iron and Coal Co.* (4)

Revie v. *Cumming* (3) and *Plumb* v. *Cobden Flour Mills Co.* (1) must be regarded as decisions on the facts in those particular cases. The present case falls within *Chilton* v. *Blair & Co.* (5) Here the workman was not acting outside the sphere of his employment. He was fulfilling his duty of keeping a look-out, but was doing it in the wrong way.

See also *McWilliam* v. *Great North of Scotland Ry. Co.* (6) Upon the evidence in this case, although it is not disputed that the

(1) [1914] A. C. 62.
(2) [1912] A. C. 44.
(3) (1911) 5 B. W. C. C. 483.
(4) [1914] W. N. 257; 7 B. W. C. C. 387.
(5) [1914] W. N. 290; 7 B. W. C. C. 607.
(6) (1914) 7 B. W. C. C. 875.

C. A. 1915

HERBERT v. SAMUEL FOX & CO., LIMITED.

applicant had added to the risks of his employment, and was acting contrary to a prohibition of which he was aware, yet he did no more than endeavour to find a better way of fulfilling what he was employed to do. The decision appealed from was right.

T. E. Ellison, in reply. What the applicant did was no more within the sphere of his employment than was riding in the tub by the boy in *Barnes* v. *Nunnery Colliery Co.* (1) When a workman by doing something which he is prohibited from doing adds a risk to his employment, any accident which occurs in consequence cannot properly be regarded as arising out of his employment.

LORD COZENS-HARDY M.R. This is a case in which I find it wholly impossible to avoid having so much sympathy with the injured boy that I am in danger of stretching the law in his favour; but I cannot bring myself to think that in the circumstances which I will shortly state he is entitled to any compensation under the Workmen's Compensation Act, 1906.

The boy was employed as a shunter on a private line of railway connected with some private works. His duty, as defined by himself and as made quite clear by the formal notice which was posted up, was to keep a look-out by walking in front of the waggons when they were being shunted or moved. I will read the words of the notice. "When railway waggons are being moved by hand or by an engine a look-out man must be in front of the waggons. Any person not obeying this order will be instantly dismissed." In the present case an engine had been engaged in shunting and when that work was finished the engine had to go back to the engine shed, which was some three-quarters of a mile off; but in the course of getting there it was part of the duty of the engine driver and the engine to pick up any waggons which were in the way and required moving forward. It was the duty of the shunter to go with the engine and trucks. There were four trucks which had to be moved, and they were pushed forward by the engine. The front one of those trucks was a truck with high sides, and one which, of course, had buffers in front. The boy had his shunting pole

(1) [1912] A. C. 44.

and, while the train was going about four miles an hour, he got on the right-hand buffer of the front truck and put his legs, I gather, to the right. Somehow or other, owing to what happened to his shunting pole, he fell off the buffer and came down with his head in the six-foot way, but his legs across one of the rails. His legs were crushed and terribly injured and he claims to be compensated in respect of it.

It seems to me that we are absolutely bound by the decision of the House of Lords in *Barnes* v. *Nunnery Colliery Co.* (1) to say that by riding on this buffer in the way in which he did instead of walking in front of the trucks he was doing that which he was not instructed to do at all, and in the doing of which he incurred a risk which, as between him and his employer, he ought not to have been exposed to. I need not go through the facts of *Barnes* v. *Nunnery Colliery Co.* (1), but I will state them very shortly. Some boys who were employed in a coalpit had arrived at the pit bottom and were on their way to the place where they had to work. They were ordered not to ride to their work in the tubs but to walk there. Instead of that they rode in the tubs, and one of them met with a fatal accident. It was held that his dependant could not recover. I am perfectly unable to distinguish the principle of that case from the principle of the present one.

I need not refer to the case of *Plumb* v. *Cobden Flour Mills Co.* (2), which, I think, follows *Barnes* v. *Nunnery Colliery Co.* (1), because the latter case seems to me to be so clear and so direct that it is unnecessary to go further. There has been a great deal of argument by counsel for the workman to the effect that this is not a case of that kind at all. He says that the man was told to go in front and keep a look-out; that he did keep in front in the sense that he got on the buffer of the front waggon; and he was doing what he was told to do, though it may be negligently and contrary to express orders. That being so, he says the Court ought to hold that it was an accident arising out of the employment, and he relies upon a recent decision of this Court in *Chilton* v. *Blair & Co.* (3) as giving some support to that

(1) [1912] A. C. 44. (2) [1914] A. C. 62.
(3) 7 B. W. C. C. 607.

C. A.
1915
HERBERT
v.
SAMUEL
FOX & Co.,
LIMITED.
Lord
Cozens-Hardy
M.R.

proposition. Of course if *Chilton* v. *Blair & Co.* (1) is inconsistent with *Barnes* v. *Nunnery Colliery Co.* (2) and *Plumb* v. *Cobden Flour Mills Co.* (3) it cannot prevail. I have considered the judgments of all the members of the Court in that case, but I have not been able to see any difficulty in it. Now what was that case? In the course of my judgment I said this: "It is well established that a workman who is seriously and permanently disabled by an accident may recover compensation if he was doing the work he was employed to do, though doing it negligently and contrary to rules laid down. On the other hand, a workman cannot recover compensation if he was not doing the work he was employed to do, but was doing something substantially different, although intended to produce the same result." *Mawdsley* v. *West Leigh Colliery Co.* (4) is an instance of the first class, where a workman's duty was to oil machinery, and he was told not to do it while the machinery was in motion. He did it while the machinery was in motion, and yet he was held to be entitled to recover. That case is also referred to by Swinfen Eady L.J. in the judgment which he gave in *Chilton* v. *Blair & Co.* (1) Again, a little further on, I said, "An instance of the second class is found in the recent case in the House of Lords of *Plumb* v. *Cobden Flour Mills Co.* (3), where a man, whose duty it was to pile up sacks by hand, took it upon himself to rig up some machinery to lift them. It was held, affirming this Court, that he had taken himself out of his employment."

The facts in *Chilton* v. *Blair & Co.* (1) were shortly these. The injured boy was actually doing that which he was employed to do, and he was doing it at the place where he was instructed to be, but, instead of doing it standing, he was sitting down or resting on some sort of ledge where it was convenient for him to sit, and where undoubtedly boys were in the habit of resting, if they could escape the eyes of their master. It seems to me that case comes exactly within *Mawdsley* v. *West Leigh Colliery Co.* (4) There is no relation, in my view, between that case and *Barnes* v. *Nunnery Colliery Co.* (2)

In my opinion the present case comes clearly within *Barnes*

(1) 7 B. W. C. C. 607.
(2) [1912] A. C. 44.
(3) [1914] A. C. 62.
(4) (1911) 5 B. W. C. C. 80.

v. *Nunnery Colliery Co.* (1) and not within *Chilton* v. *Blair & Co.* (2)

For these reasons I think, without going into all the numerous authorities on this branch of the law, I am driven to the conclusion that this accident did not arise out of the employment in which the boy was engaged, but that it did arise from a departure from that which was his proper employment, and a departure of such a nature as to disentitle him to compensation.

For these reasons, but not without regret, I think the award must be set aside and the appeal allowed.

SWINFEN EADY L.J. In this case the applicant was a shunter, and he was employed to shunt waggons on the premises of the respondents. He met with an accident. He has been examined, his evidence was taken on commission, and he has given a full account of the accident. On the day in question it appears that he was engaged until about half-past 12; at that time the work was practically finished; the engine was to go back to the engine shed and the men were to go to their dinner. The engine had to pick up waggons on the way and, as the engine driver said, there were four waggons which were picked up and coupled to the engine. Then there was a run of about three-quarters of a mile to the engine shed. It was the duty of the lad to accompany the trucks as far as the engine shed. His duty as stated in his own language was this: "My proper duty is to walk in front of the waggons to keep a proper look-out." Then he says: "It is against the rules to ride on the waggons; it is not part of my work to get on to the waggons and it was a dangerous thing to ride on the buffer." His own account of the way the accident happened was that he got upon the right-hand buffer of the waggon farthest from the engine, which was running tender first and pushing the waggons in front of it. He said that having got on to the right-hand buffer of the front waggon he was sitting sideways with his legs hanging to the right-hand side of the line. Then he says: "I had hold of my shunting pole with both hands; the end of the pole was under the drawbar of the waggon; the pole was resting on the top of

(1) [1912] A. C. 44. (2) 7 B. W. C. C. 607.

C. A. 1915

HERBERT v. SAMUEL FOX & Co., LIMITED.

Swinfen Eady L.J.

the right-hand buffer." It is perfectly easy to follow the description the man gives of the position he was in at the time of the accident, seated sideways on the right-hand buffer, keeping himself there with the shunting pole, one end of which was under the drawbar and the other end of which rested on the top of the buffer. Then how did the accident happen? He says: "I fell off the buffer because the shunting pole slipped." He fell on to the line; some of the waggons passed over his legs; he was severely injured and is not well yet. That is how the accident happened according to the boy's own story. The rule, which the Master of the Rolls read, is: "When railway waggons are being moved by hand or by an engine a look-out man must be in front of the waggons. Any person not obeying this order will be instantly dismissed." That is the rule and he knew it, and he knew, as he says, that his proper duty was to walk in front of the waggons to keep a look-out. It is difficult to see how, seated on this buffer, he could have been in the position not only to keep a look-out but immediately to warn the engine driver to pull up or stop if it were necessary for him to do so. If he were in his proper place, walking in front of the waggons, it would be easy for him to signal from either side of the train to the engine driver, but, seated on this buffer, it is difficult to see how he could perform his duty. But perhaps the explanation is that as they had finished collecting the trucks and the engine had to run back three-quarters of a mile to the shed, he was not contemplating meeting any obstruction on the way to the engine shed. This is not a case in which disobedience to the rules has been winked at by the employers, and there was a clear disobedience of the rules; but this of itself would not disentitle the man to recover. However, it seems to me that in the present case the man had departed from the sphere of his employment, and that the thing which he was engaged in doing was different in kind from what he was employed to do. If one considers not only the facts in *Barnes* v. *Nunnery Colliery Co.* (1), but also the way in which the point was put by each of the learned Law Lords who dealt with it, the matter becomes plain. That was the case of a boy, who was unfortunately killed, riding in a tub at a colliery

(1) [1912] A. C. 44.

to the place where he worked. He had descended the pit and had reached the engine slope, and had to go down the incline to a particular level. Instead of walking down, he rode on one of the tubs and, his head coming in contact with the roof, he was killed. The learned county court judge found that he did not ride for his own pleasure. No doubt he rode for the sake of saving himself the trouble of walking. He may have got to his work more quickly than by walking, and certainly with less fatigue to himself; but he was going to a place in the workings on his employers' premises and about his business, only (as it was there held) he had departed from the sphere of his employment by entering the tub and riding down when he was forbidden to do so. The way in which it was put by Lord Loreburn is this. He says: "An arbitrator has to ask himself, was the injury by accident caused by something reasonably incidental to the employment?" Then he refers to the breaking of the rule by the boy, and says: "Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his services by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." Now apply that to the present case. Here, instead of walking in front of the waggons, the man was riding on the buffer. That was something different in kind from anything he was required or expected to do and was also put outside his duty by a definite prohibition of which he was fully aware. Then Lord Atkinson, who delivered the next judgment, puts it in this way: "The unfortunate deceased in this case lost his life through the new and added peril to which, by his own conduct, he exposed himself, not through any peril which his contract of service directly or indirectly involved or at all obliged him to encounter. It was not therefore reasonably incidental to his employment. That is the crucial test. It has been many times adopted." Every word of that is applicable to this case. The workman sustained the injuries entirely through the new and added peril to which, by his own conduct, he exposed himself, and not through any peril which his contract of service obliged him

C. A. 1915

HERBERT v. SAMUEL FOX & Co., LIMITED.

Swinfen Eady L.J.

to encounter. There was no difficulty at all in the shunting of the waggons, and no accident at all in connection with the shunting; but he got on to the buffer, where he ought not to have been, and fell off and was injured. Then Lord Shaw agrees and Lord Mersey takes the same view. Lord Mersey said that, for himself, if he had been at liberty to draw a conclusion of fact, which he did not consider himself at liberty to do, he would have come to the conclusion from the evidence that the boy was riding for his own pleasure, but, because the learned county court judge had come to the opposite conclusion of fact and had so expressed himself in his judgment, the House dealt with it upon that footing, and held, nevertheless, that the accident did not arise out of or in the course of the employment. To my mind the present case is indistinguishable from *Barnes* v. *Nunnery Colliery Co.* (1)

Then it was said that the case of *Chilton* v. *Blair & Co.* (2) raises a difficulty. I do not think it does. *Chilton* v. *Blair & Co.* (2), as the Master of the Rolls has already said, was merely another instance of *Mawdsley* v. *West Leigh Colliery Co.* (3) In that case it was argued that the employment was to oil machinery at rest and not in motion, and that the workman therefore put himself outside the sphere of his employment by oiling it when in motion, but the answer to that argument was that the employment was to oil the machinery; he was told not to oil the machinery in motion and he disobeyed his instructions, but the employment was to oil the machinery and this he was doing when the accident happened. *Chilton* v. *Blair & Co.* (2) merely follows *Mawdsley* v. *West Leigh Colliery Co.* (3) and is another instance of the same thing.

In the present case the conduct which led to the accident, the thing which the lad was doing, was different in kind from what he was employed to do, and, in my opinion, he was outside the sphere of his employment as soon as he began to ride on the buffer of the railway waggon.

For these reasons I am of opinion that the appeal should be allowed.

(1) [1912] A. C. 44. (2) [1914] W. N. 290; 7 B. W. C. C. 607.
(3) 5 B. W. C. C. 80.

PHILLIMORE L.J. I dissent with diffidence. I think that this appeal should fail and that the applicant should keep his award. The learned county court judge having found the facts, one has to apply one's own mind to them and draw one's own conclusion. I entirely agree with Swinfen Eady L.J. that the right conclusion of fact is that this boy was, as indeed he says he was, riding on the buffer, and I agree he was not riding for any purposes of his employers. I know he says that so riding he could keep a better look-out. I do not accept that. I think he was riding entirely to save fatigue, because he had got three-quarters of a mile to go to the shed, and he preferred to ride rather than to walk. Possibly he may have thought, as it had come to the dinner hour, that the engine might travel a little quicker if he sat on the truck instead of walking in front of the train. On the other hand, I do not think it ought to be taken against him that he was less efficient while riding on the buffer, because no point was put to him in his cross-examination to suggest that he was. In so riding he disobeyed orders and he added a risk, but he was nevertheless discharging the work which he was employed to do.

There are four cases which have a bearing upon this; two only a slight bearing. I propose to deal with these first and dismiss them. *Plumb* v. *Cobden Flour Mills Co.* (1) is, to my mind, a different case. There the workman had only one duty: to lift sacks by hand and place them upon each other. Finding it difficult to do, and acting no doubt as he may have thought in his employer's interest, he made use of some revolving machinery which he had no business to touch; it was not there for this purpose and it had nothing to do with his work, and in endeavouring to use that machinery he met with an accident. It seems to me that in doing so he was acting out of the scope of his employment.

McWilliam v. *Great North of Scotland Ry. Co.* (2), which is, of course, not binding on us, is a decision of the Court of Session. So far as it goes, and is an authority for us, I think it rather supports the argument of counsel for the respondent, and

(1) [1914] A. C. 62. (2) 7 B. W. C. C. 875.

C. A. 1915

HERBERT v. SAMUEL FOX & CO., LIMITED.

Phillimore L.J.

it encourages me a little in the decision that I am coming to. That is all I will say about it.

The two cases I have really to consider are *Barnes* v. *Nunnery Colliery Co.* (1) and *Chilton* v. *Blair & Co.* (2) If it were not for *Chilton* v. *Blair & Co.* (2) I might find myself bound to take that view of *Barnes* v. *Nunnery Colliery Co.* (1) which would make it decisive against the applicant; but, having the later decision in *Chilton* v. *Blair & Co.* (2) and it being, to my mind, possible to take two views of *Barnes* v. *Nunnery Colliery Co.* (1), I find myself not bound by *Barnes* v. *Nunnery Colliery Co.* (1) to decide against the applicant. It is quite true this Court must obey the decision of the House of Lords, so also must it obey an Act of Parliament, but a decision of this Court construing an Act of Parliament is a decision which this Court follows, and the decision of this Court construing a judgment of the House of Lords is a decision, as I have always understood, that this Court follows too.

In *Barnes* v. *Nunnery Colliery Co.* (1) if the view had been accepted which the learned county court judge took, the case would have been a very strong one indeed, but, if the head-note is right, it is clear, I think, that the House of Lords found that there was no evidence to justify his finding. If that is so, what view did the House of Lords take? Did they take the view that the boys were merely saving fatigue by riding in the tubs, or did they take the view that the boys were doing it for amusement? It seems to me that it is open to the latter construction, and, knowing, as I do, the views of the learned Lords, I cannot help thinking that they did take the view that the boys were amusing themselves, and that this view underlies their decision. It seems to me that this is a good, sound and broad principle: If a workman (or perhaps I ought almost to say a workboy, because it would be only one who was young and foolish who would do such a thing) either in doing, or coming to, or departing from his work, in those cases where coming to or departing from the work is to be regarded as part of his employment, uses something as a means of a game and thereby adds the risk of an accident which in fact supervenes, then that accident does not arise out of his

(1) [1912] A. C. 44. (2) [1914] W. N. 290; 7 B. W. C. C. 607.

employment, but arises out of his game; but, if that is not the case, and the workman merely does something careless or imprudent, or something to save himself fatigue, then, though in doing so he adds to the risk of his employment, and though he disobeys his orders, he is still entitled, or his dependant in the case of his death is still entitled, to say that the accident arose out of his employment. *Chilton* v. *Blair & Co.* (1), to my mind, falls quite plainly within that principle, and I do not think it is made any weaker, but, if anything, stronger, by saying that it follows *Mawdsley* v. *West Leigh Colliery Co.* (2) I do not care whether it follows *Mawdsley* v. *West Leigh Colliery Co.* (2) or not, but for the purpose of considering it I look at the case itself. The boy was working upon a machine; he was told to work standing; he added a danger by working sitting, which he was told not to do, but, nevertheless, he was held entitled to recover. Here this boy was told to go in front of, or to keep ahead of, a line of trucks and engine, so as to keep a look-out in order to prevent collisions, and he does his work no better, but, from the way the case was conducted, I ought to say no worse by sitting on the buffer. He disobeyed orders and he added a risk, but, nevertheless, in my view, he ought to be entitled to recover. Therefore I think this appeal should be dismissed.

Appeal allowed.

Solicitors for appellants: *J. B. Somerville, for F. G. & H. E. Smith, Bradford.*

Solicitors for respondent: *Pitman & Sons, for Chambers & Son, Sheffield.*

(1) [1914] W. N. 290; 7 B. W. C. C. 607. (2) 5 B. W. C. C. 80.

G. A. S.

C. A.

1915

Jan. 21, 22, 26.

[IN THE COURT OF APPEAL.]

JIBB *v.* CHADWICK.

Employer and Workman—Injury by Accident—Compensation—Arising out of and in Course of Employment — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A foreman joiner was in the employment of the appellants, who were builders carrying on business at Rotherham, a short distance from Sheffield, where they had contracts for work. The foreman lived at Rotherham, and the appellants provided him with a railway season ticket between the two places. It was his duty to return each evening at a specified time in order to report upon his work. One evening he arrived at Sheffield Station just as the train, by which it was necessary for him to travel in order to keep his appointment at Rotherham, had started. He endeavoured to get into it whilst in motion, fell between the train and the platform, and was killed. Upon a claim by his dependants for compensation under the Workmen's Compensation Act, 1906:—

Held, that the risk attaching to the attempt to enter a train in motion was not a risk reasonably incidental to the deceased's employment. He had exposed himself to an added risk by doing an unauthorized and illegal act, and the accident did not, therefore, arise out of the employment within s. 1, sub-s. 1, of the Act.

Appeal from an award of the judge of the Rotherham County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The award was in favour of the dependants of a man who was killed while attempting to enter a train in motion.

The deceased man was a foreman joiner in the employment of the appellants, who were builders. Both the appellants and the deceased lived at Rotherham, a short distance from Sheffield. The appellants had a good deal of work at Sheffield, particularly in connection with the premises of the Midland Railway Company. The deceased had a season ticket, which was paid for by the appellants, between Rotherham and Sheffield. He was instructed to return to the appellants' office at Rotherham before 6 o'clock in the evening to report what he had done in the course of the day. The last train which would bring him to Rotherham in time to get to the office before 6 left Sheffield at

5.26. On the evening in question he arrived late, and the train was actually in motion as he entered the station. He ran and attempted to get into the moving train, but fell between it and the platform, was carried forward until the train could be stopped —about 150 yards—and was so much injured that he died.

The county court judge held that the accident arose out of and in the course of the employment and awarded compensation to the dependants.

The employers appealed.

T. E. Ellison, for the appellants. This case is covered by the decision in *Pritchard* v. *Torkington*. (1) The only difference in the facts is that there the man was killed whilst crossing the line instead of going over the footbridge. There is no distinction in principle between the two cases.

The question of entering vehicles in motion was considered in *Renfrew* v. *McCrae*. (2) There the Lord Justice-Clerk dealt with both classes of risk, namely, ordinary risk and added risk. A similar case is to be found in *Wemyss Coal Co.* v. *Symon*. (3)

Scott Fox, *K.C.*, and *H. T. Waddy*, for the respondents. The cases relied upon by the appellants are distinguishable. It was open in this case to the county court judge to find as he has done. The workman took the added risk in the interests of his employers.

[LORD COZENS-HARDY M.R. Do you say that this case is within *Pierce* v. *Provident Clothing and Supply Co.*? (4)]

That is the submission. The risk incidental to railway travelling is one of the risks of his employment. This case is another illustration of the principle applied in *Martin* v. *J. Lovibond & Sons*. (5)

The workman was instructed by his employers to return to the office by a specified time, and it was a matter of importance to them that he should do so. It was his duty to catch this particular train, and in trying to do so he met with the accident,

(1) (1914) 7 B. W. C. C. 719.
(2) (1914) 7 B. W. C. C. 898.
(3) (1912) 6 B. W. C. C. 298.
(4) [1911] 1 K. B. 997.
(5) [1914] 2 K. B. 227.

C. A. 1915

JIBB v. CHADWICK.

which thus clearly arose out of and in the course of his employment.

[PHILLIMORE L.J. referred to *McNeice* v. *Singer Sewing Machine Co.* (1), which was followed in *Pierce* v. *Provident Clothing and Supply Co.* (2)]

Kitchenham v. *Owners of S.S. Johannesburg* (3) is not really an authority against the appellants. There the man was ashore with leave, but on his own business. He was walking on the quay as an ordinary member of the public. *Renfrew* v. *McCrae* (4) has no analogy to this case. The respondents rely upon the qualifications which were put in *Wemyss Coal Co.* v. *Symon.* (5) The act there complained of could not be said to be done in the interests of the employer's business.

[SWINFEN EADY L.J. The Lord Justice-Clerk in that case said: "Nothing can be more clear than that if such an act is dangerous, and for that reason forbidden, the person who breaks the rule which is known to him does so at his own risk."]

The question is whether the act is so remote from the employment that it cannot be said to arise out of and in the course of it: *Walton* v. *Tredegar Iron and Coal Co.* (6); *McWilliam* v. *Great North of Scotland Ry. Co.* (7); *Kearon* v. *Kearon.* (8) A workman may break rules in cases of emergency without losing his right to compensation under the Act: *Rees* v. *Thomas.* (9) In *Barnes* v. *Nunnery Colliery Co.* (10) and *Plumb* v. *Cobden Flour Mills Co.* (11) it was pointed out that there was no emergency. In *Pritchard* v. *Torkington* (12) the act was not committed in the interests of the employer's business: see also *Richard Evans & Co.* v. *Astley.* (13)

T. E. Ellison in reply. No risk beyond the ordinary risk involved in going by train was attached to this man's employment. The appellants rely upon *Pritchard* v. *Torkington.* (12) It is said that this was a case of emergency and that the duty

(1) 1911 S. C. 12.
(2) [1911] 1 K. B. 997.
(3) [1911] A. C. 417.
(4) 7 B. W. C. C. 898.
(5) 6 B. W. C. C. 298.
(6) (1913) 6 B. W. C. C. 592.
(7) (1914) 7 B. W. C. C. 875.
(8) (1911) 4 B. W. C. C. 435.
(9) [1899] 1 Q. B. 1015.
(10) [1912] A. C. 44.
(11) (1913) 6 B. W. C. C. 245.
(12) 7 B. W. C. C. 719.
(13) [1911] A. C. 674.

of getting into the train in motion was cast upon the deceased, but it cannot be successfully contended that there was any implied duty to commit a statutory offence. There is no evidence to show a case of emergency.

Cur. adv. vult.

Jan. 29. LORD COZENS-HARDY M.R. This is an appeal by employers against an award in favour of the dependants of a man who met his death by reason of attempting to enter a train in motion. Stated in this form, it is not easy to see any ground for holding that the accident arose out of the man's employment. But out of respect for Mr. Scott Fox's argument I propose to consider the case rather more fully.

The deceased man was a foreman joiner in the employment of the defendants, who are builders. Both the builders and the foreman lived at Rotherham, a short distance from Sheffield. The builders had a good deal of work at Sheffield, particularly in connection with the premises of the Midland Railway Company. The foreman had a season ticket between Rotherham and Sheffield. He was expected to return to the office at Rotherham before 6 o'clock in order to report what he had done in the course of the day. The last train which would bring him to the office before 6 left Sheffield at 5.26. On the evening in question he arrived rather late, and the train was actually in motion as he entered the station. He ran and attempted to get into a carriage, but he fell between the carriage and the platform, was carried forward until the train could be stopped—about 150 yards—and was so much injured that he died.

Now it is contended (1.) that he was more exposed to risks of the railway than ordinary people by reason of his employment, which is evidenced by his having a season ticket provided by his employers; (2.) that what the man did was in his masters' interest, and to enable him to reach Rotherham before 6 o'clock; (3.) that the act which caused his death may have been serious and wilful misconduct, but that is an irrelevant circumstance; and (4.) that it is very usual to attempt to enter a train in motion.

I am not satisfied that his employment did expose him more

C. A. 1915

JIBB v. CHADWICK.

Lord Cozens-Hardy M.R.

to railway accidents than ordinary people. Moreover this was not a railway accident, and even assuming that death due to a railway collision between Sheffield and Rotherham might have made the employers liable to pay compensation, wholly different considerations apply to the present case. He exposed himself to an additional risk by doing an unauthorized and illegal act.

To say that the act was done in his masters' interest and not for his own pleasure is not sufficient. There is not a particle of evidence to show what he was doing between 5, when the joiners left off work, and 5.26, when the train started. To perform his duty towards his masters he ought to have started earlier to reach the station before 5.26. I think he was not employed to do this illegal act, either expressly or by implication as incidental to his employment. The risk involved in attempting to get into a train in motion was not a risk reasonably incident to or "arising out of" his employment.

What I have said is in accordance with the view expressed by the Lord Justice-Clerk in *Wemyss Coal Co.* v. *Symon*. (1)

In my opinion the appeal must be allowed with the usual consequences.

SWINFEN EADY L.J. The applicant, who was a foreman joiner, was killed on March 24, 1914, while attempting to enter a train in motion, which was leaving Sheffield for Rotherham. He was crushed between the train and the platform. He lived at Rotherham, where the head office of his employers is situate, and he had a contract railway ticket between Sheffield and Rotherham, a distance of five or six miles, paid for him by the employers. The employers have a contract with the railway company to do general repairs to stations, goods-sheds, and property within a radius of ten or twelve miles from Rotherham. On March 24 he had been supervising railway work at Sheffield; the hour when joiners cease work at Sheffield is 5 P.M. The applicant was desirous of returning to Rotherham by the 5.26 P.M. train from Sheffield, in order to be at his employers' office before 6 P.M. to give certain information which it had been

(1) 6 B. W. C. C., at p. 301.

his duty to collect that day, and which he had been instructed to report at the office before 6 P.M. This train was the last one which would bring him home before 6 P.M.

Upon these facts, about which there is no dispute, the question is whether the decision of the county court judge that the accident arose " out of " the employment can be supported.

It was urged that the act of endeavouring to enter a train in motion was in the employers' interest, to enable him to return to his masters' office at Rotherham before 6 P.M. as directed; but if his employment bound him to use this particular train it must equally have bound him to be at the station in sufficient time before the train started, and there is no evidence of what (if anything) occurred to prevent him, or of how he was actually engaged between 5 and 5.26 P.M., or of where he actually was. No cause has been shown, or suggested, why he could not have been at the station in proper time for the train.

The ground upon which in my opinion this case falls to be decided is that the risk attaching to the attempt to enter a train in motion was not a risk reasonably incident to the deceased's employment. If his occupation required him to use the railway between Sheffield and Rotherham more than most people and by reason thereof, he is to be regarded as having been specially exposed to the risks of railway travelling (like the commercial traveller in *Pierce* v. *Provident Clothing and Supply Co.* (1), to street risks of a cycle), still the risk of entering a train in motion, which is prohibited by Act of Parliament, cannot be included or regarded as one of the risks of railway travelling.

It was said by the Lord Justice-Clerk in *Wemyss Coal Co.* v. *Symon* (2): " On railways it is a punishable offence to enter or leave a train when in motion. It is of course often done, with the result that from time to time accidents do occur. But nothing can be more clear than that if such an act is dangerous, and for that reason forbidden, the person who breaks the rule which is known to him does so at his own risk. . . . . I cannot therefore see how it can be held that the doing of an act forbidden, and known to be forbidden, can be held to make a master liable for an accident to his message boy on the footing that the accident

(1) [1911] 1 K. B. 997. (2) 6 B. W. C. C. 298, at p. 301.

C. A. 1915

JIBB v. CHADWICK.

Swinfen Eady L.J.

arose out of his employment. . . . . It is not in any way like an accident such as making a false step upon a stair."

Here it was urged that the risk was run in order to enable the deceased to fulfil his duty to his employer, but this was not even established in fact, as there was no evidence of why he was late for the train.

The peril involved by the deceased's contract of service was to travel by the train in the ordinary way, and he was not doing anything incidental to the proper performance of his duty when the accident happened. He exposed himself to an added risk or peril which was not incidental to his employment—" an added peril due to the conduct of the man himself": *Pritchard* v. *Torkington.*(1)

In my opinion the appeal should be allowed.

PHILLIMORE L.J. I have had the advantage of reading the judgments prepared by the Master of the Rolls and Swinfen Eady L.J., and I have really nothing to add to them.

I have thought at times that there are decisions on the words " arising out of his employment " which are somewhat hard on the workman and which if I could I should like to reconsider.

But after reading the judgments of the other members of the Court I feel no difficulty in this case, and their reasons are to me convincing that the risk which the deceased took and the injury by accident which he sustained did not arise out of his employment.

I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *Smiles & Co., for Arthur Neal & Co., Sheffield; Telfer Leviansky & Co., for Clegg & Co., Rotherham.*

(1) 7 B. W. C. C. 719.

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.
1915
Jan. 19, 20, 29.

WILLIAMS *v.* LLANDUDNO COACHING AND CARRIAGE COMPANY, LIMITED.

Employer and Workman—Compensation—Accident arising out of and in the Course of the Employment—Special Risk of Employment—Death of Workman—Drunkenness—Serious and Wilful Misconduct—Claim by Dependants—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

If an accident happens to a workman whilst acting within the scope of his authority and doing an act which it was part of his duty to do, and the accident arises from his doing that act and being thereby exposed to a special risk beyond that of other persons not so engaged, the employer is liable to pay compensation under the Workmen's Compensation Act, 1906, although the workman was doing the act negligently and contrary to rules laid down for his guidance.

If, therefore, a state of facts is proved which brings the workman within this proposition, the fact that he was drunk when the accident happened, or indeed the fact that the proximate cause of the accident was his drunkenness, will not disentitle him—or in the case of death his dependants—from recovering compensation from his employer where death or serious and permanent disablement results.

Frazer v. *John Riddell & Co.* (1914) W. C. & Ins. Rep. 125; 7 B. W. C. C. 841, followed.

Frith v. *Owners of S.S. Louisianian* [1912] 2 K. B. 155; *Murphy & Sandwith* v. *Cooney* (1914) W. C. & Ins. Rep. 44; 7 B. W. C. C. 962; *Nash* v. *Owners of S.S. Rangatira* [1914] 3 K. B. 978; and *Renfrew* v. *R. & J. McCrae, Ld.* (1914) W. C. & Ins. Rep. 195; 7 B. W. C. C. 898, distinguished.

The workman was engaged by the respondents as a stableman, his duty being to chop and mix feed for the horses and convey it to various stables by carts. The loft in which he performed this duty was reached by a vertical ladder, fixed a little distance from the wall, which he had to ascend and descend. In attempting to ascend the ladder in the course of his employment the workman slipped and fell sideways, striking his head against a window-sill, causing injuries from which he died. At the time of the accident the deceased was under the influence of drink.

On an application by his dependants for compensation:—

Held, that the accident resulting in the death of the workman, though due to his serious and wilful misconduct, was none the less an accident arising out of and in the course of his employment, and that his dependants were therefore entitled to compensation.

APPEAL from an award of the judge of the Carnarvonshire County Court sitting at Conway as arbitrator under the Workmen's Compensation Act, 1906.

C. A.
1915

WILLIAMS v. LLANDUDNO COACHING AND CARRIAGE COMPANY, LIMITED.

The applicant Ann Evans Williams, the widow of John Williams, a stableman, claimed compensation on behalf of herself and the two infant children of the marriage in respect of the death of her husband by an accident arising out of and in the course of his employment with the respondents.

The facts as found by the county court judge were as follows:—

"(1.) On the 31st of January, 1914, the deceased was engaged with the respondents as a stableman, his duty being to chop and mix feed for the horses and convey it to the various stables by carts.

"(2.) The loft in which the deceased had to chop hay for the horses was in Oxford Road, Llandudno, and was approached by a vertical ladder fastened and running parallel to but a little distance from the wall; and it was part of the deceased man's duty to ascend and descend the ladder.

"(3.) On the day in question the deceased was seen by the respondents' manager about 9 A.M. He was then sober and in a condition fit and proper for the discharge of his duties.

"(4.) At 12.30 the deceased, in the course of his employment, was going up the ladder to the loft for feed for the top stable, and had got up about nine steps, when he slipped and fell sideways, striking his head against a window-sill, causing injuries from which he died on the 15th of February, 1914.

"(5.) At the time of the accident the deceased was under the influence of drink."

There was uncontradicted evidence that the deceased workman was told by the managing director of the respondents on the morning in question to wash certain motor cars, which he did not do, and that a fellow workman told him not to go up to the loft as he was not in a fit condition to do so.

The county court judge, after stating the findings of fact above set out, said that in his opinion slipping off the ladder was a risk incidental to the employment of the deceased; that his accident might or might not have been due to his intoxicated condition; and that if he had to decide the point he should say it was due to his intoxicated condition. But, on the above findings, if the

decision in *Frazer* v. *John Riddell & Co.* (1) was right, although that might rightly be called an accident due to the serious and wilful misconduct of the deceased, it was none the less an accident arising out of and in the course of the employment, and his award must therefore be for the applicant for the agreed sum of 186*l.* 15*s.* with the usual costs.

The respondents appealed.

W. Shakespeare, for the appellants. The learned judge was wrong in holding that the accident arose out of the employment. It was attributable solely to the drunkenness of the workman and there was no evidence to show that it arose out of the employment. The test appears to be whether there was a concurrent cause arising from the nature of the employment: *Frith* v. *Owners of S.S. Louisianian* (2); *Nash* v. *Owners of S.S. Rangatira* (3); *Murphy & Sandwith* v. *Cooney* (4); *Renfrew* v. *R. & J. McCrae, Ld.* (5) On the other hand, in *Frazer* v. *John Riddell & Co.* (1) it was held in the case of an engine driver who slipped off the footplate of his engine whilst in a state of intoxication that the accident arose partly from the nature of and therefore out of the employment. If a man gets drunk in the course of his employment there is an interruption of the employment until he returns to the employment with or without his employer's consent. The continuity of the employment is broken. The authorities are somewhat conflicting, but on the English decisions it is clear that this accident did not arise out of the employment. If the decision in *Plumb* v. *Cobden Flour Mills Co.* (6) is binding it is impossible to hold that the accident arose out of the employment. There was no risk incidental to the employment. No employment anticipates drunkenness.

R. I. Simey, for the respondent. There is no authority for the proposition that the contract of employment can be interrupted by drunkenness and recommenced without the consent of the employer. There was evidence here on which the judge was

(1) (1914) W. C. & Ins. Rep. 125; 7 B. W. C. C. 841.
(2) [1912] 2 K. B. 155.
(3) [1914] 3 K. B. 978.
(4) (1914) W. C. & Ins. Rep. 44; 7 B. W. C. C. 962.
(5) (1914) W. C. & Ins. Rep. 195; 7 B. W. C. C. 898.
(6) [1914] A. C. 62.

C. A. 1915

WILLIAMS v. LLANDUDNO COACHING AND CARRIAGE COMPANY, LIMITED.

entitled to hold that the accident arose out of the employment. Wilful and serious misconduct does not necessarily prevent the workman from recovering. This case is covered by the principle of *Wicks* v. *Dowell & Co.* (1), where a workman had an epileptic fit whilst engaged at his work and fell into the hold of a ship and he was held entitled to compensation. The question is not who was in fault, but whether the man was acting within the employment. *Frazer* v. *John Riddell & Co.* (2) is directly in point. There the workman, at the time when the accident happened, was actually doing the work he was employed to do and it was held that the accident arose out of the employment notwithstanding his drunkenness. The present case is distinguishable from *Murphy & Sandwith* v. *Cooney* (3) and *Renfrew* v. *R. & J. McCrae, Ld.* (4) on the ground that in neither of those two cases was there any evidence to show how the accident happened, and consequently it was impossible to hold that it arose out of the employment. In *Kitchenham* v. *Owners of S.S. Johannesburg* (5) the case failed because it was not proved whether the man fell from the gangway or the quay. It had nothing to do with drunkenness.

[LORD COZENS-HARDY M.R. referred to *Bist* v. *London and South Western Railway.* (6)]

This case is just the case which was put by the Master of the Rolls by way of illustration in *Frith* v. *Owners of S.S. Louisianian.* (7) He there said: "If this man had been ordered to go aloft, or anything of that kind, when in a state of intoxication, and met with an accident, it might very well be that that would have been an accident arising out of the employment notwithstanding his drunkenness." This illustration appears to have been accepted as a correct statement of the law by the Court in *Nash* v. *Owners of S.S. Rangatira.* (8) In that case Nash was doing nothing which was incidental to his employment. He was using the gangway in precisely the same manner as any passenger would

(1) [1905] 2 K. B. 225.
(2) (1914) W. C. & Ins. Rep. 125; 7 B. W. C. C. 841.
(3) (1914) W. C & Ins. Rep. 44; 7 B. W. C. C. 962.
(4) (1914) W. C. & Ins. Rep. 195; 7 B. W C. C. 898.
(5) [1911] A. C. 417.
(6) [1907] A. C. 209.
(7) [1912] 2 K. B. 155, 159.
(8) [1914] 3 K. B. 978.

use it. There was no risk peculiar to the employment. Here the workman was doing the very thing which it was part of his employment to do. The cases are therefore distinguishable on the facts.

[LORD COZENS-HARDY M.R. There was no finding here of the county court judge that the ladder was dangerous.]

A perpendicular ladder must always be dangerous. The county court judge appears to have thought that there was some element of danger.

It was part of the workman's business to go up the ladder to get feed for the horses. It may have been wrong of him not to have first washed the motor cars as he was told to do, but the liability of the employers cannot be affected by the workman varying the order in which he does his work.

W. Shakespeare in reply. It has been attempted to explain *Frazer* v. *John Riddell & Co.* (1) on the ground that the accident there was due to an employment risk. If it be the fact that the Scotch and Irish decisions turned on whether the accident was due to an employment risk, it follows that they are in conflict with the English decisions. [He also referred to *Blovelt* v. *Sawyer*. (2)]

Cur. adv. vult.

Jan. 29. LORD COZENS-HARDY M.R. read the following judgment:—This appeal raises a question which has given rise to differences of judicial opinion, namely, how far drunkenness, or rather in what circumstances drunkenness, is an answer to a claim by dependants. In *Frith* v. *Owners of S.S. Louisianian* (3) a sailor at a foreign port was so hopelessly drunk that he could not walk and was brought along the quay by a negro just as his vessel was starting, and was pushed on board like a bag of sand. He rose from the deck, staggered, and fell overboard at a place where the rail had not been replaced, and he was drowned. It was held by this Court that the accident did not arise out of the employment, although the sailor was on the ship, but it was due to his drunken condition. In *Nash* v. *Owners of S.S. Rangatira* (4) the

(1) (1914) W. C. & Ins. Rep. 125; 7 B. W. C. C. 841.

(2) [1904] 1 K. B. 271.

(3) [1912] 2 K. B. 155, 159.

(4) [1914] 3 K. B. 978.

C. A.
1915

WILLIAMS
v.
LLANDUDNO
COACHING
AND
CARRIAGE
COMPANY,
LIMITED.

Lord
Cozens-Hardy
M.R.

principle of *Frith's Case* (1) was, it may be, slightly extended, though I doubt it. There a sailor who had gone on shore with leave returned in a drunken condition along the quay. There was a gangway, a part of the ship, well constructed and properly lighted, and used both by the crew and passengers, including ladies. To a man not under the influence of drink it was perfectly safe. Before he reached the top of the gangway he let go of one of the guide ropes, swung round, and fell and broke his head. It was held by this Court, Pickford L.J. dissenting, that the accident did not arise out of his employment, although it happened within the ambit of his employment on the ship and in a place more attended with risk than the quay itself.

These decisions are binding upon this Court, even if it should be held that the Scotch Courts have taken a different view of the law.

The authority principally relied upon in support of the alleged difference is *Frazer* v. *John Riddell & Co.* (2) There an engine driver, while driving a traction engine, fell off the footplate and was fatally injured. At the time he was under the influence of drink and unfit for his work, and the arbiter refused compensation and held that the accident did not arise "out of" his employment. But the Court of Session held that the man was actually performing the duty which he was employed to perform—namely, to drive the engine—although he was guilty of serious and wilful misconduct. I do not think there is any inconsistency between this case and *Frith's Case* (1) and *Nash's Case*. (3) It is rather like a case which I put by way of illustration in *Frith's Case* (1), that if a sailor, told to go aloft, does so, when in a state of intoxication, and meets with a fatal accident, that might be an accident arising out of the employment, notwithstanding his drunkenness.

The facts in the present case as found by the county court judge are as follows: [His Lordship read findings (1.) to (5.) above set out and also finding (6.), which was in the following terms: "In my opinion slipping off the ladder was a risk incidental to the employment of the deceased, and his accident may or may not

(1) [1912] 2 K. B. 155, 159. 7 B. W. C. C. 841
(2) (1914) W. C. & Ins. Rep. 125; (3) [1914] 3 K. B. 978.

have been due to his intoxicated condition." He continued:] There is no finding that the ladder was not properly constructed or properly fastened. The only material finding is that the slipping off was "due to his intoxicated condition." I should add that there was uncontradicted evidence that he was told by the managing director on the morning in question to wash motor cars, which he did not do, and that a fellow workman told him not to go to the loft as he was not fit to do so. But it was his duty, and it seems to me his primary duty, to cut chaff, and for that purpose to go to the loft by ascending the ladder. I attach no importance to the circumstance that he did not on the morning in question first finish washing the motor cars.

The learned county court judge has held the dependants entitled to compensation. I think he was quite right in so holding. I do not propose to consider in detail the numerous authorities which have been called to our attention.

The true principle is this. A workman who, while doing an act which it was part of his duty to do, meets with an accident to which he is more exposed than persons not so engaged is—or in case of death his dependants are—entitled to compensation from the employer, although the act is done negligently or contrary to rules. I assume a case to which the defence of serious and wilful misconduct is not available. I think the appeal fails and must be dismissed with costs.

SWINFEN EADY L.J. read the following judgment:—The county court judge stated the facts of the case as he found them. I will not read those findings again, as they have already been read by the Master of the Rolls. He held that the fatal accident arose out of and in the course of the deceased's employment, although also an accident due to his serious and wilful misconduct. This misconduct is not a defence, as the accident terminated fatally.

It was urged by the appellants (the employers) that the real cause of the accident was the drunkenness of the deceased, and therefore that his widow could not recover, although if he had been sober and the accident had happened, it might be said to have arisen out of and in the course of his employment. It was also urged that he had been told to wash a motor car, and that

C. A. 1915

WILLIAMS v. LLANDUDNO COACHING AND CARRIAGE COMPANY, LIMITED.

Swinfen Eady L.J.

he departed from the terms of his employment by proceeding to the loft before he had done that duty. It was also said that there was a conflict of authority on the point involved in the case.

The cases establish the proposition that if an accident occurs while the workman is acting within the scope of his authority, and is doing an act which it was part of his duty to do, and the accident arises from his being engaged in doing that act and being thereby exposed to a special risk beyond that of other persons not so engaged, the employer is liable to pay compensation, although the workman is doing the act negligently or contrary to rules laid down for his guidance. Illustrations of this, are furnished by *Mawdsley* v. *West Leigh Colliery Co.* (1) where a workman was engaged to oil machinery, but told not to do so when it was in motion; and *Chilton* v. *Blair & Co.* (2), where a workman was employed to turn a wheel in a rolling machine, but told not to do so sitting down.

If a state of facts is proved which brings the workman within the proposition I have stated, the fact that he was drunk when the accident happened, or indeed the fact that the proximate cause of the accident was his drunkenness, will not disentitle him or in the case of death his dependants from recovering compensation from his employer where death or serious and permanent disablement results.

There can be no doubt that it is serious and wilful misconduct for a man to be drunk at his work, but where death ensues this element may be disregarded in considering whether the workman is entitled to compensation.

In *Frazer* v. *John Riddell & Co.* (3) the accident arose out of and in the course of the employment, and the widow of the engine driver, who fell off the traction engine he was driving, was not precluded from recovering because the fall was due to the deceased's intoxicated condition. Intoxication is not of itself a defence in the case of fatal accidents.

In the other cases referred to in the argument the accident did not arise out of and in the course of the employment; the fact of the intoxication explained how the accident arose, but did not

(1) (1911) 5 B. W. C. C. 80.
(2) (1914) 7 B. W. C. C. 607.
(3) (1914) W. C. & Ins. Rep. 125, 7 B. W. C. C. 841.

prevent a workman from recovering who would otherwise have been entitled to do so.

In *Murphy & Sandwith* v. *Cooney* (1) the first mate, who took the wheel of the ship, when he came on board heavily under the influence of drink, had been ordered away from the wheel and to go below, as he was not in a fit condition to do his work, and he had thus been removed from his work before the accident happened.

In *Renfrew* v. *R. & J. McCrae, Ld.* (2) the accident did not arise out of the employment. A commercial traveller at a railway station does not run any more risk of falling off the platform on to the line than any other intending passenger by train. The accident arose not from any special risk to which a commercial traveller is exposed by his employment, but only from the circumstance that he was intoxicated.

In *Frith* v. *Owners of S.S. Louisianian* (3) the accident did not arise out of the employment. The sailor was brought back to the ship, hopelessly drunk, and pushed "like a sack of sand" on to the deck. Fletcher Moulton L.J. said that the accident had nothing to do with the employment, except that it occurred more or less in the place of employment, that is on board the ship. It arose entirely out of his state of drunkenness.

Nash v. *Owners of S.S. Rangatira* (4) is to the same effect, and followed *Frith* v. *Owners of S.S. Louisianian.* (3) The man was on a part of the ship—that is the ship's own solid step gangway; it was an accident to a drunken man in the place of his employment. It was held that the principle of *Frith's Case* (3) applied.

In my opinion the cases cited to us are not in conflict with each other, as contended, but are reconcilable as I have endeavoured to explain, and there is not any conflict of authority with regard to them.

The fact that the deceased had not washed the motor car, when going to the loft, which it was part of his ordinary work to do, will not prevent the claim from being sustained.

(1) (1914) W. C. & Ins. Rep. 44; 7 B. W. C. C. 962.
(2) (1914) W. C. & Ins. Rep. 195; 7 B. W. C. C. 898.
(3) [1912] 2 K. B. 155.
(4) [1914] 3 K. B. 978.

C. A. 1915

WILLIAMS v. LLANDUDNO COACHING AND CARRIAGE COMPANY, LIMITED.

In my judgment the award of the county court judge was correct, and this appeal should be dismissed.

PHILLIMORE L.J. read the following judgment:—In this case the county court judge has found that the man met with an injury by accident which caused his death, the accident being that when going up a vertical ladder to a loft, where he had to chop hay to provide feed for the horses in one of the stables under his charge, he slipped and fell sideways and struck his head.

He has further found (*a*) that the deceased was under the influence of drink; (*b*) that the slipping off the ladder was a risk incidental to his employment; (*c*) that his accident may or may not have been due to his intoxicated condition; (*d*) that if he had to decide he should say that it was due to it; and, following the authority of the case of *Frazer* v. *John Riddell & Co.* (1), he has held that though due to the serious and wilful misconduct of the deceased it was none the less an accident arising out of and in the course of his employment, and he has made an award in favour of the applicant.

I think his conclusions of fact cannot be disturbed.

A point was taken for the employers that the man was not acting within his employment because he ought to have been doing some other part of his work first. I see nothing in this point. The work which he was engaged in was part of his work, perhaps taken out of due order. The accident therefore occurred in the course of the deceased's employment. I think also that the county court judge was right in holding that it arose out of his employment.

There was an element of risk in the task on which the deceased was engaged. It was a job in which a careless man might meet with an accident, might slip and fall, and his drunkenness made him careless.

The case is, as the county court judge thought, indistinguishable from *Frazer* v. *John Riddell & Co.* (1), where an intoxicated driver slipped and fell from the footplate of a traction engine. In the argument before us this case was fully discussed, as were

(1) (1914) W. C. & Ins. Rep. 125; 7 B. W. C. C. 841.

the following: *Renfrew* v. *R. & J. McCrae, Ld.* (1); *Murphy & Sandwith* v. *Cooney* (2); *Frith* v. *Owners of S.S. Louisianian* (3); *Nash* v. *Owners of S.S. Rangatira.* (4) In these last four cases the decisions were against the applicants.

Renfrew v. *R. & J. McCrae, Ld.* (1) is, as is *Frazer* v. *John Riddell & Co.* (5), a decision of the Court of Session, and is a later decision. The Court in deciding against the applicant distinguished the two cases, and I think rightly. The element of intoxication is common to the two; but in the latter case it was unimportant. The deceased, a commercial traveller, might have had business in the town of Beith and said he was going to do business there; but there was no evidence that he did any. He may have gone there merely for a jaunt with his fellow traveller in the dogcart which the latter had hired. Even if he did go there on business and was returning thence to his home by train, the accident of his slipping off the platform on to the rails (if he did slip off) was not one to which his employment particularly exposed him. He was at best like the servant going to the post in *Sheldon* v. *Needham.* (6)

In *Murphy & Sandwith* v. *Cooney* (2) the drunken mate of a ship was ordered away from the wheel and it may be off the bridge by the master. As the Court of Appeal in Ireland viewed the facts it was not proved that he met with his accident in obeying this order. The Court thought it consistent with the facts that after leaving the wheel as ordered he just stood about and finally fell or rolled off the bridge on to the deck and got killed; and so the decision was against the applicant. The judgments seem to imply that if the man had got killed while descending the ladder from the bridge in obedience to an order the applicant would have recovered, even though the accident was due to drunken carelessness.

In *Frith* v. *Owners of S.S. Louisianian* (3) a drunken sailor who having just managed to get on board had fallen on to the deck and then attempted clumsily to rise and fallen backwards

(1) (1914) W. C. & Ins. Rep. 195; 7 B. W. C. C. 898.
(2) (1914) W. C. & Ins. Rep. 44; 7 B. W. C. C. 962.
(3) [1912] 2 K. B. 155.
(4) [1914] 3 K. B. 978.
(5) (1914) W. C. & Ins. Rep. 125; 7 B. W. C. C. 841.
(6) (1914) 7 B. W. C. C. 471.

C. A. 1915

WILLIAMS v. LLANDUDNO COACHING AND CARRIAGE COMPANY, LIMITED.

Phillimore L.J.

overboard was held not to have met with an injury arising out of his employment, because he was not employing himself on any part of the ship's work. But the Master of the Rolls said that if he had been ordered aloft and had fallen through drunken carelessness the case might have been different. The supposed case is exactly the present case.

Nash v. *Owners of S.S. Rangatira* (1) is perhaps more difficult. But in seeking to deduce a principle of law from a judgment which the Court has rendered upon certain facts, I must take the facts as they appeared to that Court and not as they may possibly appear to me.

In *Nash's Case* (1) the majority of the Court thought that the accident did not arise out of the man's attempting to fulfil his employment or arrive at his place of employment, and therefore dismissed the application. Pickford L.J. took a different view and would have granted it. On the view which the majority took *Nash's Case* (1) is not this case.

On the whole none of the four cases relied upon for the employers are authorities for deciding the present case, while on the other hand *Frazer* v. *John Riddell & Co.* (2) is in point and is, I think, sound and right.

I think this appeal should be dismissed.

Appeal dismissed.

Solicitors : *Pritchard, Englefield & Co., for Brighouse, Jones & Co., Ormskirk*; *Sharpe, Pritchard & Co., for Porter, Amphlett & Co., Conway.*

(1) [1914] 3 K. B. 978.
(2) (1914) W. C. & Ins. Rep. 125; 7 B. W. C. C. 841.

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.
1915
Jan. 29.

CHUTER *v.* J. J. FORD & SONS, LIMITED.

Employer and Workman—Compensation—Industrial Disease—Certifying Surgeon—Refusal to give Certificate of Disablement—Appeal to Medical Referee—Finality of his Decision—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-ss.* 1 (*i.*), (*iii.*) (*f*), 4—*Regulation* 14—*Forms* 3, 13, 15.

When a workman appeals from the refusal of a certifying surgeon to give him a certificate of disablement from an industrial disease under s. 8, sub-s. 1 (i.), of the Workmen's Compensation Act, 1906, and the medical referee allows the appeal and fixes the date of disablement, his decision is final, and is equivalent to the certificate which the certifying surgeon ought in the opinion of the medical referee to have given.

APPEAL from a decision of the deputy judge of the Westminster County Court upon a special case stated by an arbitrator under the Workmen's Compensation Act, 1906.

The applicant, Charles Chuter, claimed compensation under the Act from the respondents, J. J. Ford & Sons, Limited, in respect of the disease of lead poisoning which he alleged he was suffering from, the disease being due to the nature of his employment in his capacity as plumber to the respondents.

The applicant alleged that he became ill on May 22, 1913. He consulted a doctor, who gave him the following certificate, dated November 24, 1913: "Charles Chuter was seen by me on the 24th May, 1913, and he was then suffering from cerebral hæmorrhage. He has had two mild attacks since that date. I am of opinion that the diseased state of his blood vessels is due to the fact that he has been working in lead for many years." On January 30, 1914, he applied to the certifying surgeon of the district in which he was employed for a certificate under s. 8, sub-s. 1 (i.), of the Act, and on February 23, 1914, the certifying surgeon gave the following certificate: "Having personally examined Charles Chuter, who has applied for a certificate of disablement in respect of lead poisoning, being a disease to which the Workmen's Compensation Act applies, I am not

C. A. 1915

CHUTER v. J. J. FORD & SONS, LIMITED.

satisfied that he is suffering from the said disease so as to be disabled from earning full wages at the work at which he has been employed."

Thereupon the applicant, feeling himself aggrieved by the refusal of the certifying surgeon to give him a certificate of disablement, appealed under s. 8, sub-s. 1 (iii.) (*f*), to the medical referee, and on March 9, 1914, the medical referee, adopting Form 15 of the Regulations of the Secretary of State, gave his decision as follows: "I allow the appeal of Charles Chuter against the refusal of Mr. B. Mayston Bond to give him a certificate of disablement in respect of lead poisoning, being a disease to which the Workmen's Compensation Act applies"; and on April 22, 1914, on the request of the applicant, he gave an amended certificate fixing the date of disablement under s. 8, sub-s. 4. The material part of the amended certificate was as follows: "I allow the appeal of Charles Chuter against the refusal of Mr. B. Mayston Bond to give him a certificate of disablement in respect of lead poisoning, a disease to which the Workmen's Compensation Act applies, and I fix the date of the happening of the accident as the 24th May, 1913."

The applicant, having obtained this decision of the medical referee, applied on May 14, 1914, for an arbitration, and the matter came on for hearing on July 17, 1914, before the duly appointed arbitrator. In the course of the hearing two points were raised which the arbitrator referred by way of a special case for the decision of the judge. The points submitted by the special case were: (1.) Whether the certificate of the medical referee (supposing it to be a valid certificate) was conclusive and binding on the respondents as to the applicant suffering from lead poisoning on and before April 22, 1914. (2.) Whether the fact that the certificate did not state in terms that the applicant was disabled from earning full wages at the work at which he was employed invalidated the certificate.

The deputy county court judge decided both these points in favour of the applicant. He held (1.) that the decision of the medical referee was conclusive as to the existence of the disease from May 24, 1913, to March 9, 1914; and (2.) that the certificate

was not irregular and invalid by reason of the omission from it of a statement that the workman was disabled by the disease from earning full wages at the work at which he was employed.

The employers appealed.

Ellis Hill, for the appellants. In this case there has been no certificate by the certifying surgeon that the workman was suffering from a scheduled disease and was thereby disabled from earning full wages, as is necessary under s. 8, sub-s. 1, before the workman can claim compensation as for an injury by accident. The required certificate must state (inter alia) the leading symptoms of disease: Regulations made by the Secretary of State, Form 3. The certifying surgeon refused to give such a certificate, and, the workman being aggrieved by his action in so refusing, the matter was referred under s. 8, sub-s. 1 (iii.)(*f*)(1), to the medical referee, who simply gave his decision in accordance with Form 15 allowing the appeal and fixing the date on which the disablement commenced. It is said that under s. 8, sub-s. 1 (iii.) (*f*), that decision is final, but the submission is that it is final only so far as it allows or dismisses the appeal. There must still be a certificate by the certifying surgeon to the effect that the man is suffering from a scheduled disease, and is thereby disabled, and setting out the leading symptoms. The Court will not act upon a certificate which is irregular: *Mapp* v. *Straker & Son.* (2)

In *Jones* v. *Ebbw Vale Steel, Iron and Coal Co.* (3) Form 15 was criticized in that it requires the medical referee to decide the condition of the man at some previous time when he was not attending him.

When the workman has obtained the required certificate from the certifying surgeon then s. 1 operates in his favour and he is entitled to proceed to arbitration in the usual way, but it is said

(1) Sect. 8, sub-s. 1 (iii.) (*f*), provides: "If an employer or workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement . . . . for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final."

(2) (1914) 7 B. W. C. C. 18.

(3) (1910) 3 B. W. C. C. 181.

C. A. 1915

CHUTER v. J. J. FORD & SONS, LIMITED.

that if the matter is referred to the medical referee his decision is final and cannot be disputed.

Sect. 8 makes the certificate of the certifying surgeon a condition precedent to the right of the workman to claim compensation as for an accident. The certificate of the medical referee is got behind the back of the employer, and he ought to have an opportunity of refuting what may be merely the statement of the workman. The "matter" which is referred to the medical referee under s. 8, sub-s. 1 (iii.) (*f*), is whether the appeal shall be allowed; anything beyond that is not binding on the employer. There is nothing to prevent the employer from disputing the date which is fixed by the medical referee as the date of disablement: *Garrett* v. *Waddell & Son.* (1) Regulation 14 prescribes the materials upon which the medical referee is to base his decision. It cannot be that the perfunctory fixing of the date in that way is binding on the employer.

The certifying surgeon is bound in his certificate to state the leading symptoms of disease. The medical referee is under the same obligation, and in this case he has not fulfilled it.

[LORD COZENS-HARDY M.R. referred to *Winters* v. *R. Addie & Sons' Collieries.* (2)]

There a certificate had been granted. Here there is none, and there is nothing to satisfy s. 1, sub-s. 1.

W. D. Mathias (*S. Low* with him), for the respondent. With reference to the finding of the deputy judge that the decision of the medical referee was conclusive as to the existence of the disease from May 24, 1913, to March 9, 1914, it is admitted that the latter date should be February 23, 1914, that being the date when the matter was before the certifying surgeon.

Under s. 8, sub-s. 1 (iii.) (*f*), the decision of the medical referee that the man was suffering from lead poisoning from March 24, 1913, till February 23, 1914, is final.

It is open to the appellants to suggest (1.) that he is not now suffering from the disease; (2.) that the disease was not caused by the employment; or (3.) that it was not contracted during his employment by the appellants. It is said that the certificate was

(1) 1911 S. C. 1168; 5 B. W. C. C. 507.

(2) 1911 S. C. 1174; 5 B. W. C. C. 511.

obtained behind the back of the employers, but the material documents were sent to them by the registrar of the county court, namely, the certificate of the workman's medical attendant, a copy of the application, and the certificate of the certifying surgeon. The appellants, therefore, had notice of what the workman claimed to be suffering from, and had an opportunity of sending a statement in opposition to the medical referee.

The medical referee sitting as a court of appeal had to decide whether the action of the certifying surgeon was right or wrong. Then it is said that there is no certificate at all. But all the requirements of the Act have been complied with. It is immaterial whether the procedure prescribed by the Act is the most convenient. In giving his decision allowing the appeal in accordance with Form 15 the medical referee must be taken to have given the certificate which the certifying surgeon ought, in his opinion, to have given.

On the construction of the Act the respondent is entitled to succeed. There is no clear authority on the point, because in the Scottish cases what was objected to was some addition to the certificate. They did not turn upon the point now before the Court.

Ellis Hill in reply. What is contemplated under s. 8, sub-s. 1, is a certificate expressly stating the matters there mentioned, and not the decision of the medical referee leaving those matters to be determined from inference. There is no certificate in this case such as to satisfy the provisions of s. 8, sub-s. 1.

LORD COZENS-HARDY M.R. The Court is indebted to counsel for their arguments upon this which is undoubtedly a point of difficulty and importance. In substance it is this. What is the effect where, in the case of an industrial disease, the certifying surgeon reports against the workman, and he appeals and the decision—I use that word rather than certificate, although I think it means the same thing—of the medical referee is in favour of the workman? In order to answer that question it is necessary to go in some little detail through s. 8, the industrial diseases section of the Act. It is a section full of difficulty. The main scheme of the Act, apart from this section, was this:

C. A. 1915

CHUTER v. J. J. FORD & SONS, LIMITED.

Lord Cozens-Hardy M.R.

no right to compensation unless you can find an accident—a definite event resulting in injury to the workman—entitling him to compensation. It is quite obvious, and it has been so decided, that that has no application at all to a case where a workman is injured by reason of an industrial disease, which disease he has contracted in the course of his employment. There is a schedule of these industrial diseases; it is not necessary to mention them, but one of them is lead poisoning and its sequelæ.

Upon going through s. 8 we find that a right to apply for compensation is given to a workman in the event of certain things being established. He may apply if a certifying surgeon certifies that the workman is suffering from a scheduled disease and is thereby disabled from earning full wages at the work at which he is employed. That is what the surgeon has to certify: Aye or No, is the workman in question suffering from, say, lead poisoning, and is he disabled by that disease from earning full wages at the work at which he was employed? That means at the date of the certificate. I disregard sub-ss. 2 and 3, because they do not apply to the present case. That is one thing. Then there is something else which he has to establish which is certainly not left to the certifying surgeon—"and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment." That is to say, that which in no sense is an accident is made to have the same effect as if it had been an accident. Then you are face to face with the general scheme of the Act. What is the date of the accident? Many things turn on the date of the accident. Notice has to be given as soon as practicable after the accident and there is a limitation to the period of claim. So the Legislature were faced with the fact that they must make some provision for fixing the date of the accident, and that is done by sub-s. (*a*) in the proviso: "The disablement or suspension shall be treated as the happening of

the accident." Then we come to this: the certifying surgeon has to certify in the first instance, and then it is provided that if the certificate of the certifying surgeon is not approved by either the workman or the employer the party aggrieved may go to a medical referee, and by sub-s. (*f*) of s. 8, sub-s. 1, it is referred to a medical referee, "whose decision shall be final." Then proceeding to sub-s. 4, that says: "For the purposes of this section the date of disablement "—which of course is the date of the accident—"shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given." The certifying surgeon might well say that a man was suffering from industrial disease and was thereby disabled, but that he could not determine the date when the disablement commenced. If he cannot do that then the date of the certificate is by statute made the date of the accident. Then sub-s. (*a*) provides: "Where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement "—which is what happened here—"the date of disablement shall be such date as the medical referee may determine."

In a case like this, where the certifying surgeon declines to give a certificate and the medical referee reverses his decision and gives a certificate—it is called the certificate in sub-s. 4, although elsewhere it is called the decision—the date is to be that which the medical referee fixes. It is for him to determine the date of the accident. Then in order to appreciate this we have to go back to the regulations, which again are not easy to deal with. Regulation 14 deals with the case of an order referring to the medical referee, and it provides that the medical referee shall decide on the matter referred to him upon such information as shall be available, and with or without a personal examination. He is not in a case of this sort, and could not be, tied down to what the Courts would consider strict evidence. He is left very much at large. He, it is properly assumed, will do his duty in this matter and he is not tied down to strict evidence. Then regulation 16 is remarkable: "The medical referee shall, in the form prescribed in the schedule to these regulations

C. A.
1915

CHUTER
v.
J. J. FORD & SONS, LIMITED.

Lord Cozens-Hardy M.R.

(subject to such additions and modifications as the circumstances of the case may require), notify in writing his decision to the registrar of the county court." Then, if you look at Form 15 and take the one which is applicable to the present case, it says: "I allow the appeal of (name of workman) against the refusal of Mr. (name of surgeon) to give him a certificate of disablement in respect of "—in this case lead poisoning—" and I fix the (blank) day of (blank) as the date on which the disablement commenced." That is all. There is nothing in the form imposing any obligation to do that which the certifying surgeon was to do, namely, to state what were the leading symptoms of the disease which, in his opinion, the man was suffering from. No such obligation is put on the medical referee. He is not bound to certify the symptoms, which may be very important for any higher tribunal dealing with the case.

I have come to the conclusion that the certificate of the medical referee in a case like this is conclusive as to the nature of the industrial disease and the date of the accident, that is to say the date of disablement, and also as to the fact that the man was suffering from that disease, not at the date of the medical referee's certificate, but at the date of the certifying surgeon's certificate. It is said that this is a great hardship on the employers, and to some extent, if it be right for us to consider it, I think there is force in that, but, on the other hand, in a matter of this kind, when dealing with such an obscure matter as an industrial disease, there is great common sense in saying: "There is the certifying surgeon; if you do not like him there is the medical referee, who is highly competent and who has authority to deal with this matter, and his decision shall be final." If you look at the list of different industrial diseases, and if you consider the amount of litigation and the amount of expense and trouble and worry there might be if it were necessary to take evidence as to whether, at some antecedent date, the man was or was not suffering from one of these obscure diseases, I think the provisions as to industrial diseases would be of very little value to the workman. I think the policy of the Act was to leave it to a competent tribunal—I agree ex parte—to say whether there was an accident at all, that is

to say, whether the disease came within the schedule of diseases, and what was the date of the disablement. It is not quite as bad as Mr. Ellis Hill suggested, for the registrar is bound, before the medical referee proceeds, to give notice to the employer, who has the opportunity afforded him of submitting a memorandum to the medical referee; he can, at least, put his view before the medical referee. As I read it, it would be contrary to the policy of the Legislature to allow the certificate of the certifying surgeon if unappealed to be gone behind, and in any event to allow the certificate of the medical referee to be gone behind. On that point I think the learned deputy judge was quite right in holding on this special case that the certificate of the medical referee cannot be disputed so far as it finds that on May 24, 1913, the man was suffering from lead poisoning and so far as it certifies that the disablement continued, not at the date of his (the medical referee's) award, but the date when the matter was before the certifying surgeon.

Then it is said that there is here no certificate upon which to found proceedings in this matter, and that the decision of the medical referee is not a certificate at all. I have no reason to regret anything I said in the case of *Mapp* v. *Straker & Son.* (1) That was a case of a certifying surgeon, not of a medical referee. If on the face of the certificate the certifying surgeon says the man has a scheduled disease, and then goes on to say "But for the life of me I cannot find whether it is so or not," that is no certificate at all. There Judge Rentoul, sitting at the City of London Court, declined to act upon a certificate of that sort, and this Court upheld his decision. Unless there is something of that nature I fail to see any ground upon which we can interfere.

Let us consider what the matter is. The man's claim was undoubtedly for a certificate of disablement in respect of lead poisoning, that being a disease within the schedule. Then the certifying surgeon said: "I am not satisfied that he is suffering from the said disease so as to disable the man from earning full wages at the work at which he has been employed." That came before the medical referee and he gave his certificate: "I allow

(1) 7 B. W. C. C. 18.

C. A.
1915
CHUTER
v.
J. J. FORD & SONS, LIMITED.
Lord Cozens-Hardy M.R.

the appeal of the workman against the refusal of the certifying surgeon to give him a certificate of disablement "—you must look at what he was asked for and what he gives—" and I fix the date of the happening of the accident as the 24th May, 1913." I fail to find any defect in this of such a nature as will invalidate the proceedings. It will be observed that there is a reference in the certificate itself to the application to and the refusal of the certifying surgeon, and the referee decided that the decision of the certifying surgeon was wrong. That is what he was bound to do, and if you look at Form 15 there is nothing binding him to fix the date of disablement. Form 15 seems to me to be embarrassing in some respects; but there it is, and as long as it stands I cannot bring myself to say that the certificate was in any way objectionable subject to this slight difference in date. It came before the certifying surgeon on February 23, and it came before the medical referee on March 9. The date when it came before the certifying surgeon whose order was reversed is the critical date, and not the other.

With that exception I think the decision of the learned judge in the Court below was right and the appeal must be dismissed.

SWINFEN EADY L.J. On this appeal from the decision of the county court judge upon a case stated by an arbitrator two points were raised, and the points as stated by the arbitrator were, first, whether the certificate of the medical referee—that should be the decision of the medical referee—is conclusive as to the existence of the disease on May 24, 1913, to March 9, 1914, inclusive; and, secondly, whether the said decision is irregular and invalid by reason of the omission of the statement that the workman was disabled by the disease from earning full wages at the work at which he was employed.

In this case an application was made by the workman to the certifying surgeon, and the certifying surgeon did not give a certificate. He was not satisfied that the applicant was suffering from lead poisoning so as to be disabled from earning full wages at the work at which he was employed, and he did not give a certificate. Thereupon the workman appealed, as he was

entitled to do, and asked for the decision of the medical referee. Under s. 8 it will be observed that the statute provides that the workman is to be entitled to compensation, not, in terms, if he is suffering from an industrial disease—that is not the language of the section—but where the certifying surgeon certifies that he is suffering from, putting it shortly, an industrial disease and is thereby disabled from earning full wages, then he is entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of the employment. But the condition precedent to his right to recover is not that it shall be established to the satisfaction of the Court that he is suffering from an industrial disease, but that the certifying surgeon shall certify that he is suffering from that disease and thereby disabled, and if that event happens—if there is that certificate—then he is to be entitled to compensation as if the disease were a personal injury. Then in the event of the certifying surgeon refusing there is a provision in sub-clause (*f*). If the workman is dissatisfied with the action of the certifying surgeon in refusing to give a certificate of disablement for the purposes of the section, the matter shall, in accordance with regulations made by the Secretary of State, be referred to a medical referee, whose decision shall be final.

Regulation 14 says that the medical referee shall decide on the matter referred to him forthwith, and forms are given—Form 15—for the decision of the medical referee. In the case of the certifying surgeon it is provided by r. 3 that the certificate given shall be in the form prescribed by the schedule to the regulations, and that form contains a statement in paragraphs 1, 2, and 3, the name and address of the man, his employment, the name and place of business of the employer; then, in paragraph 4, the leading symptoms of disease. So if the certificate is given by the certifying surgeon it is to be in that form, which therefore must contain the leading symptoms of the disease. The medical referee either allows or disallows the appeal. If he allows the appeal it can only be on the footing that two matters are established to his satisfaction, otherwise the certificate was properly refused. The two points

C. A. 1915

CHUTER v. J. J. FORD & SONS, LIMITED.

Swinfen Eady L.J.

are these: It must be established to his satisfaction that the workman is suffering from an industrial disease. That alone is not sufficient. A man may very well be suffering from lead poisoning and yet may be able to continue his work. It must be established, first, that the workman is suffering from an industrial disease and, secondly, is thereby disabled from earning full wages at the work at which he was employed. The medical referee can only allow the appeal on being satisfied on both those points, and if he allows the appeal it follows it is because he is satisfied on both those points. Those are the points which, in the first instance, are to be decided by the certifying surgeon and on appeal from him by the medical referee. When the medical referee decides, his decision is final. That still leaves open the question of date, and this is provided for by sub-s. 4 (*a*): "Where the medical referee allows an appeal against a refusal by the certifying surgeon to give a certificate of disablement the date of disablement shall be such date as the medical referee may determine." Here the medical referee has allowed the appeal, and has fixed the date of disablement as May 24. In my opinion, the decision of the medical referee is conclusive on both employer and workman and cannot be questioned in these proceedings.

With regard to the date, it is really decided by the Scottish case, or it is the necessary inference from it, that the medical referee has to say Aye or No, was the decision of the certifying surgeon right or wrong? and that must involve whether it was right or wrong at the date when it was given; and seeing that it was wrong for the medical referee to add a statement that "the man has now recovered"—that is to say, that it was not within his statutory duty to state the condition of the man at the date when he examined him—it follows that the true date as of which the decision is given is the date when the man was examined by the certifying surgeon. In the present case that will involve a slight modification of the order, by substituting the date February 23 for March 9.

In a former case of *Jones* v. *Ebbw Vale Steel, Iron and Coal Co.* (1) the Master of the Rolls pointed out the difficulty

(1) 3 B. W. C. C. 181.

that arose with regard to Form 15 in the schedule to the regulations. This is the same form that we have now to consider, and there would obviously be additional security if the medical referee followed the same form as the certifying surgeon would have done if he had given the certificate. The security involved by that being done is well illustrated by the case of *Mapp* v. *Straker & Son.* (1) There the certifying surgeon certified according to the language of the statute, that the man was suffering from lead poisoning or its sequelæ, and then he added that there were none of the usual symptoms, and that the disease could only be inferred from the man's history of the case—in other words, he was unable to comply with the statutory form that he should set out the leading symptoms of the disease; it was held that the judge was entitled to ignore the certificate. If that had been the case of a decision of a medical referee merely deciding in general terms, without it being necessary to set out any symptoms, serious injustice to the employers might have resulted. It would be an additional advantage and an additional safeguard if the form that is given for use by the certifying surgeon (Form 3), containing certain particulars, were also to be furnished for the decision of the medical referee; but at present there has been no alteration in the form, and it remains as it did when *Jones* v. *Ebbw Vale Steel, Iron and Coal Co.* (2) was decided.

For these reasons I think, subject to the slight modification in the date, this appeal fails and ought to be dismissed.

PHILLIMORE L.J. I am of the same opinion, and I doubt whether what I am going to say is anything but a repetition of what has been said by the other members of the Court. It is perhaps convenient that all of us should express our opinions fully on this matter. The original conception of the Workmen's Compensation Act was that the workman was to be compensated for injury by accident arising out of and in the course of the employment, but it was determined by the later Act to add a category of industrial disease. If it had been simply a case of

(1) 7 B. W. C. C. 18. (2) 3 B. W. C. C. 181.

C. A.
1915

CHUTER
v.
J. J. FORD
& SONS,
LIMITED.

Phillimore L.J.

adding industrial disease it would have been left, I presume, to the county court judge or other arbitrator to determine whether the man was suffering from the industrial disease, and whether it arose out of and in the course of his employment. But the Act, which introduced the scheme in respect of industrial disease apparently because inconvenience was seen in submitting some of these questions to a non-medical judge or arbitrator, provided that certain stages, so to speak, of the necessary journey which the workman had to make to get compensation should be determined in another manner. The Legislature provided for it in this way. The workman is not to get to the county court judge or other arbitrator at all till he has got certain preliminary matters determined in his favour by the certifying surgeon. It is a condition precedent to his suing in the county court that he shall previously have got a finding—I am using as general words as I can—by the certifying surgeon on certain points in his favour. Then it was thought that perhaps that was leaving too much in the hands of the certifying surgeon. Therefore for this preliminary tribunal a preliminary court of appeal, so to speak, was established in the form of a medical referee. That was a tribunal of appeal to which either party might go and a tribunal whose decision was to be final. The decision of the certifying surgeon was to be final in this sense, that it could not be questioned in any other proceedings except in its own special appeal. The decision of the medical referee is final in every respect. That being the case, the decision of the medical referee to my mind clearly takes the place of the certificate of the certifying surgeon. It was suggested that the proper course was for the workman or the employer, as the case might be, to go back to the certifying surgeon and say, "See, a higher medical authority has put you right; alter your certificate"—an invidious position in which to put a medical man. It is suggested that the successful appellant might even get a mandamus to compel him to do so, not a very economical thing, but an extremely expensive thing. Instead of that, what is to be done is much more simple, namely, to enter that judgment which the Court below ought to have given; and therefore it seems to me

on the first point taken by Mr. Ellis Hill—namely, that you must still get the certificate of the certifying surgeon—his argument fails.

Then if that be so, what is left? The medical referee has to give that certificate which the certifying surgeon ought to have given. How is he to give it? Any words will do which sufficiently express his meaning—above all, any words will do which the statute says shall express his meaning; and the rules made and the forms annexed to these rules provide the way in which the medical referee shall override the certifying surgeon; and overriding the certifying surgeon and giving the certificate or decision which the certifying surgeon ought to give is not to be effected by writing it all over again, but by simply saying "I allow the appeal." If it is a case where the workman is the complainant the certifying surgeon has rejected his application because either he thinks that he has no industrial disease or thinks that he has not been disabled from earning full wages for more than a week. If the appeal is allowed it must mean that he has an industrial disease and that he has been disabled from earning his full wages for more than a week, and the allowance of the appeal has the same effect as if it were written out.

One thing remains. Besides those two matters the certifying surgeon has to fix the date, and if he refuses to certify he has fixed no date; and therefore it will be necessary for the medical referee to fix the date; and the statute has covered even this ground by providing in sub-s. 4 (*a*) that where he allows an appeal against a refusal to give a certificate of disablement he shall determine the date of disablement, and that date is to be, it seems to me for all purposes, the date which the medical referee determines.

Therefore I think that the matters decided by the medical referee, both that this man was suffering at the date when he went before the certifying surgeon, who ought to have certified he was suffering and that he was disabled, as required by the statute, and what the date of the disablement is or was, are matters about which there can be no question and which for all purposes are binding. What the further effect of that

C. A. 1915

CHUTER v. J. J. FORD & SONS, LIMITED.

may be is a matter we have not to determine to-day. Therefore I agree, with the modification of February 23 for March 9, that the deputy county court judge was right.

Appeal dismissed.

Solicitors: *Watson, Sons & Room; Sidney Smith & Son.*

G. A. S.

C. A. 1915 *Jan.* 28; *Feb.* 9.

[IN THE COURT OF APPEAL.]

PRICE *v.* WESTMINSTER BRYMBO COAL AND COKE COMPANY.

Employer and Workman—Injury by Accident—Compensation—Weekly Payment—Agreement for Redemption—Application to record—Death of Workman before Record—Subsequent Record of Agreement—Right of Administratrix to enforce Agreement—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1; *Sched. I., cl.* 17, 19; *Sched. II., cl.* 9 (*a*), (*b*), (*d*), (*e*); *cl.* 10.

Where a valid agreement has been entered into for the redemption of a weekly payment by a lump sum, the subsequent death of either party before registration does not prevent the agreement from being recorded, and so made enforceable as a county court judgment under Sched. II., cl. 9, of the Workmen's Compensation Act, 1906.

APPEAL from a decision of the judge of the Wrexham County Court in an arbitration under the Workmen's Compensation Act, 1906.

On July 5, 1913, Peter Price, a workman employed by the respondents, was injured by a fall of the roof, and ultimately lost his right eye as a result of the accident. He was paid compensation from the date of the accident up to May 2, 1914, at the rate of 13*s.* 4*d.* per week, when it was reduced to 5*s.* 3*d.* per week. On June 6, 1914, an agreement in writing was entered into between the workman and the respondents, duly signed and witnessed, under which the workman agreed to accept and the respondents to pay in settlement of all claims under the Workmen's Compensation Act a lump sum of 85*l.* The respondents, or their agent, sent this agreement to the registrar of the

Court on June 12, 1914, to be filed. The registrar sent out the usual notices to the parties as provided by the Act, and on June 22, not having received any notice of objection to the agreement, the agreement was duly registered. In the meantime, namely, on June 18, the workman died intestate, and admittedly from causes altogether outside the accident. At the date of the registration of the agreement neither the registrar nor the respondents knew of the workman's death, and on July 3, 1914, letters of administration to the estate of the deceased workman were granted to Alice Robinson, the present applicant, a married daughter of the workman. On August 2, 1914, on an ex parte application to the registrar, supported by affidavit, leave was granted to substitute the name of Alice Robinson as applicant in the place of the workman.

There were no dependants.

On the application of the administratrix the county court judge gave leave to issue execution, treating the agreement as enforceable as a county court judgment under Sched. II., clause 9.

The employers appealed.

Holman Gregory, K.C., and *Adshead Elliott*, for the appellants. The agreement was wrongly registered. After the death of the workman nothing could properly be done by the Court. The entering into the agreement is not conclusive between the employer and the workman; it is only upon registration that it becomes effective and binding.

No right under the agreement passed to the administratrix: Sched. I., clause 19.

By Sched. II., clause 9 (*a*), no memorandum of the agreement could be recorded before seven days after the despatch by the registrar of notice to the parties. Here the seven days had not elapsed before the man died. The agreement, therefore, never became effective because it could not properly be registered.

The right to compensation vests in the dependants immediately on the death of the workman: *Darlington* v. *Roscoe & Sons* (1); *United Collieries* v. *Simpson*. (2) But in this case there are

(1) [1907] 1 K. B. 219. (2) [1909] A. C. 383.

C. A. 1915

PRICE v. WESTMINSTER BRYMBO COAL AND COKE COMPANY.

no dependants, and no rights under the agreement passed to the administratrix, who was not a dependant. The agreement is conditional and not enforceable as a judgment until properly recorded. It has never been held that any one except a dependant or his legal personal representative can rightly claim compensation. Of course if there were any arrears of the weekly payment they would pass to the legal personal representative of the deceased.

When the death of the workman does not result from the injury, as in this case, no one can recover compensation under the Act: Sched. I. (1.) (*a*); and no one can take any step under the Act to enforce payment of compensation. If the agreement had been properly recorded, then the benefit of it would pass to the administratrix as part of the deceased's estate; but the registrar had no power to record it. In practice the workman often objects before the registrar on the ground of inadequacy of amount although he may have signed the agreement.

[SWINFEN EADY L.J. If the registrar holds that it is adequate, can the workman then resile from the agreement?]

See *Rex* v. *Bow County Court Registrar*. (1) In consequence of that decision Form 38 of the Consolidated Workmen's Compensation Rules, July, 1913, was altered so that the right to object before the registrar would seem to be cut down to a right to dispute the genuineness of the agreement: see rr. 45—49A and Form 39. It is open, however, to the workman even under the new rules to object on the ground of inadequacy, although he has signed the agreement. During the seven days either party might have given notice to the registrar objecting to the recording of the agreement, and the registrar might have refused to record it. But where one party can no longer object the registrar has no power to record, and the agreement can never be made binding. If the employer (not being a company) had died before the expiration of the seven days the workman would have been relegated to his position before the agreement, that is, he would have remained entitled to the weekly payment. On June 18, when the man died, he was not in possession of any agreement which could be enforced as a judgment. The only liability resting upon

(1) [1914] 3 K. B. 266.

the employers was to make the weekly payments, and that came to an end, there being no dependants. The registrar could not put the workman into a better position after his death than that which he occupied a moment before; nor could he increase the liability of the employers. Either with or without knowledge of the death on the part of the registrar the recording of the agreement was ultra vires and cannot stand.

By s. 13 any reference to a deceased workman includes a reference to his legal personal representative or to his dependants, and under Sched. II., clause 5, all claims in case of death can be made by the legal personal representative or the dependants; but that can only refer to the case where death results from the injury by accident, and not to the case of death from natural causes. Here, the man being dead from natural causes, all liability to pay compensation ceases. All that has happened is that an agreement for a lump sum has been signed but not recorded.

Ellis Griffith, K.C., and *G. C. Rees*, for the respondent. The employers themselves sent the agreement to the registrar to be recorded. They could not raise any objection to their own agreement. The only question is whether the workman might have objected. On June 22 there was an agreement to which neither party had objected during the seven days allowed for objection. All the requirements of Sched. II., clause 9, were satisfied, and there was nothing to prevent the recording of the agreement. At the date of his death the workman had vested in him the right to have the agreement recorded, and that right passed to his legal personal representative. The agreement being upon the record, it follows that it can be enforced as a judgment.

Adshead Elliott in reply. The only right the workman had at his death was the right to receive weekly compensation.

Cur. adv. vult.

Feb. 9. LORD COZENS-HARDY M.R. This appeal raises a novel and important question as to the right of the legal personal representative of a workman to levy execution for the sum

C. A. 1915

PRICE v. WESTMINSTER BRYMBO COAL AND COKE COMPANY.

Lord Cozens-Hardy M.R.

mentioned as payable to the deceased workman by virtue of an agreement for redemption recorded by the registrar.

The undisputed facts are shortly stated by the learned county court judge. [The Master of the Rolls read the statement as above set out and continued :]

I will only add that there is no evidence, nor even any suggestion, that the agreement was open to objection on any of the grounds mentioned in the Second Schedule, clause 9 (*d*) or (*e*). The county court judge gave leave to issue execution, treating the recorded agreement as "for all purposes enforceable as a county court judgment"—clause 9. I am clearly of opinion that if the man had died on June 23, the day after the agreement was recorded, the order would have been perfectly right: see r. 96, and the relevant sections of the County Courts Act, 1888, and the Rules made thereunder. The only difficulty is due to the fact that the death occurred after the agreement was sent to the registrar, but before the seven days mentioned in clause 9 (*a*) had expired.

The agreement was not in fact or in form conditional until recorded. Rule 44 has no application, both parties being free from any legal disability. The agreement was sent for registration on June 12. Every form prescribed by the statute has been observed. There is nothing requiring the registrar to have proof that both parties were alive at the expiration of the seven days. He did that which the statute required him to do. The word is "shall" record. It is not easy to appreciate an objection by the employer that the workman had no opportunity to object, while he himself had full opportunity.

It was at one time contended by the appellants that clause 19 of the First Schedule deprives the administrator of all right. But this contention was in the course of the discussion modified, and it was admitted that the administrator can claim all rights that the deceased workman had as against his employer, such as arrears of weekly payments. In my opinion the workman had under this agreement a right which passed to and vested in his administrator, just as much as if the death had been on June 23.

I think the decision of the county court judge was correct. The appeal must be dismissed with costs.

C. A.
1915

PRICE
v.
WEST-
MINSTER
BRYMBO
COAL AND
COKE
COMPANY.

SWINFEN EADY L.J. The question raised by this appeal is whether an agreement dated June 6, 1914, for the redemption of the compensation payable to an injured workman, by the employers paying a lump sum of 85*l.*, was properly recorded by the county court registrar on June 22, 1914, the workman having died in the meantime, namely, on June 18, 1914.

The registrar at the date of recording the agreement was unaware of the workman's death.

Letters of administration to the deceased workman were granted on July 3, 1914, to Alice Robinson, a married daughter, and she has obtained leave to issue execution for the amount.

It was not disputed that if the agreement had been duly recorded in the workman's lifetime the administratrix could have obtained leave to enforce it after his death. The point is that the agreement was not properly recorded after the workman's death.

The workman and the employer entered into the agreement for redemption on June 6, 1914, pursuant to Sched. I., clause 17, the weekly payments having then continued for a period exceeding six months. On June 12, 1914, the employers duly forwarded to the registrar of the county court a memorandum of the agreement, with a request that he would record the same, pursuant to Sched. II., clause 9. Thereupon it became the duty of the registrar to record the same, subject nevertheless to the provisions of that clause, and it was contended that the Act contemplated that both parties would be alive when the agreement was recorded. There is not, however, any provision in the Act or Rules which makes it essential that both parties should be alive when the agreement is recorded. When duly recorded the agreement takes effect according to its tenor, and as of the date of the agreement, not as of the date of its being recorded. Thus under Sched. II., clause 10, if not registered in accordance with the Act, the liability to make the weekly payment continues; but if duly registered, the agreement governs the position of the parties, and the weekly payment does not continue payable until actual registration. Sched. II., clause 9 (*a*), provides that the agreement shall not be recorded before seven days after the despatch by the registrar of notice to the parties interested; in

C. A. 1915

PRICE v. WESTMINSTER BRYMBO COAL AND COKE COMPANY.

Swinfen Eady L.J.

the present case this provision was duly complied with, as notice was despatched by the registrar on June 12, 1914, and the agreement was not registered until June 22. It may be said that the deceased workman did not have seven days' notice, as the notice was sent on June 12, and he died on June 18, but although this might have been a ground for the registrar to allow further time before registering, if an application had been made to him for that purpose, it affords no ground for saying that the registration is invalid, when the lapse of time required by Sched. II., clause 9 (*a*), has duly occurred. Again it is not suggested that there was any ground for refusing registration under Sched. II., clause 9 (*d*).

It was urged by the appellants that the only right which the workman had at the date of his death was to receive the weekly compensation, and that the registrar could not after the death increase the compensation. In my judgment this contention is not well founded. After entering into the agreement of June 6, the workman had an additional right, namely, the right to have that agreement recorded, and neither employers nor workman could mero motu refuse to allow it to be recorded, but could only oppose registration on the grounds set forth in Sched. II., clause 9 (*b*) and (*d*): see *Rex* v. *Bow County Court Registrar*. (1) It was also argued that the administratrix of the deceased workman had not any title to issue execution for the amount, as Sched. I., clause 19, provides that a sum paid by way of redemption shall not pass to any other person by operation of law; this sum, however, has not yet been paid, and such a provision does not prevent an executor or administrator from enforcing payment. Indeed it was not disputed that if the agreement had been registered in the workman's lifetime his administratrix could have proceeded to enforce payment, as on the footing of a judgment debt in favour of the deceased.

I am of the opinion that where a valid agreement has been come to between employer and workman, the subsequent death of either of them does not prevent that agreement from being recorded, and so made binding. The appeal therefore fails.

(1) [1914] 3 K. B. 266.

PHILLIMORE L.J. I think that the judgment of the county court may be supported on this short ground.

By the agreement of June 6, 1914, a legal nexus was established between the workman and the employer which gave legal rights to either. Any legal rights of the workman pass, as of course, in the event of his death to his legal personal representative.

If the employer had been a natural person and not a corporation, the same would be true in the event of his death.

What are these legal rights? They are for either party to send the memorandum of the agreement to the registrar of the county court and get it recorded (Sched. II., paragraphs 9 and 10), unless there are any statutory reasons why it should not be recorded, and when recorded made enforceable. It is true that the employer may in the event mentioned in sub-paragraph (*b*) prevent its being recorded, and that the workman may under sub-paragraph (*d*) make suggestions which will lead the registrar not to record it, and that the judge may on the application of either and on proof of certain matters vacate the record or registration, under sub-paragraph (*e*).

But if none of these things occur, and the registrar does not act mero motu under sub-paragraph (*d*), the agreement will be recorded and will remain recorded, and being so recorded will be enforceable by a direct and summary process.

Neither party can by changing his mind prevent the agreement becoming thus enforceable.

None of the conditions mentioned under sub-paragraphs (*b*), (*d*), or (*e*) as enabling either party to take action occur in the present case, and the registrar has not seen reason to act mero motu under sub-paragraph (*d*).

It matters not, therefore, that the workman died during the period between the sending of the memorandum of agreement and the recording of it by the registrar. Neither party had anything more to do to complete the proceedings.

Living the workman, neither party had anything to object which could prevent the recording. His death does not ex post facto give any right to the employer under sub-paragraph (*e*); and sub-paragraph (*b*) is out of the question. His early death shows that the employers made a bad bargain, but all these

C. A. 1915

PRICE v. WESTMINSTER BRYMBO COAL AND COKE COMPANY.

Phillimore L.J.

bargains are or should be made on actuarial considerations. The chance of life is an element which either side takes into consideration. If the registrar learns of the death of either party during the seven days left for urging objections he may do well to suspend the matter till a legal personal representative has been appointed and has had the residue of the seven days allowed to him. But here the legal personal representative is satisfied and wants no delay. She claims to enforce. The procedure by which the legal personal representative got herself made a party in lieu of the deceased workman seems regular and in accordance with the general County Court Rules with which r. 96 of the Workmen's Compensation Rules provides that the latter shall be read.

I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rawle, Johnstone & Co., for Peace & Ellis, Wigan; Nowell, Evans & Turner, for Wynn Evans, Wrexham.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.
1915
Feb. 4, 9.

WILLIAMS *v.* OWNERS OF S.S. MARITIME.

Employer and Workman—Master Mariner—Death from Accident—Compensation—"Workman"—Remuneration exceeding 250l. a year—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

A ship's captain was employed under an agreement with the owners of his ship at a salary of 20*l.* per month with a bonus of 48*l.* per annum if the ship was kept free of all damage and claims, but if the ship was not so kept the bonus was to be forfeited and the salary reduced to 16*l.* per month. He was also entitled to his board and accommodation on the ship, the value of which was estimated at 45*l.* 10*s.* per annum. In the first month of her first voyage the ship foundered in a gale with all hands. Upon a claim by the captain's dependants for compensation under the Workmen's Compensation Act, 1906, the county court judge, having regard to the loss of the ship, found that the deceased's remuneration was 16*l.* per month, amounting to 192*l.* per annum, which added to 45*l.* 10*s.* for his board was less than 250*l.* per annum, so that he came within the definition of a "workman" under s. 13 of the Act, and his dependants were entitled to compensation. The employers appealed on the ground that the county court judge ought to have had regard to the fact that under a former contract of service with the same employers, similar in terms but at a slightly lower salary, the average remuneration of the captain had in fact exceeded 250*l.* a year:—

Held by the Court of Appeal, affirming the decision of the county court judge (Phillimore L.J. doubting), that in assessing the remuneration regard must be had only to the existing contract of service and to what had happened under it, and that the history of the man's employment under previous contracts was immaterial.

APPEAL from an award of the judge of the Liverpool County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The application for compensation was made by the widow on behalf of herself and the other dependants of Thomas Williams, late captain of the respondents' steamer *Maritime*, which was lost at sea with all hands on April 12, 1914.

At the time of his death Captain Williams was employed by the respondents, William Thomas, Sons & Co., Limited, under a contract dated March 13, 1914, at the rate of wages of 20*l.* a month, "and provided the said steamer is kept free of all damage and claims for twelve months the said William Thomas, Sons &

C. A. 1915

WILLIAMS v. S.S. MARITIME (OWNERS).

Co., Limited, agree as managers of the Maritime Steamship Company, Limited, to pay Captain Williams a gratuity of 48*l.* per annum, but failing to keep the steamer free of damage and claims to steamer the gratuity shall be forfeited and further the salary is to be reduced to 16*l.* per month."

The question arising upon the appeal was whether the remuneration of Captain Williams exceeded 250*l.* a year so that he was not a "workman" within s. 13 of the Act.

It appeared that Captain Williams had been employed by the respondents since January, 1907, and that under a previous agreement of January 4, 1907, he had been in command of another steamer, also called the *Maritime*. The two agreements were identical in terms except that under the earlier of them the salary was 18*l.* a month with a gratuity of 24*l.* per annum subject to forfeiture of the gratuity and reduction of the salary to 16*l.* a month upon failure to keep the ship free of damage and claims. The employment under the earlier agreement lasted until February 7, 1914. During that employment Captain Williams received his full wages of 18*l.* per month, except during certain periods amounting altogether to sixteen months and twenty-one days, when his wages were reduced to 16*l.* per month. He only received the gratuity for the year 1912. According to the evidence of the managing director of William Thomas, Sons & Co., "there was never a year between 1908 and 1913 when there was not a claim against the ship or cargo, which disentitled him to a gratuity, with the exception of 1912. . . . . Captain Williams was a good honest man, and we attributed his mistakes to his misfortune, so we gave him the 18*l.* per month notwithstanding."

The widow had received the captain's wages at the rate of 20*l.* per month under the last agreement down to the date of his death.

The county court judge held that the agreement of March 13, 1914, provided all that was necessary to ascertain the remuneration of the deceased; that as the ship had been lost his salary must be regarded as reduced to 16*l.* per month and the gratuity as forfeited. On that footing the remuneration was 192*l.* a year plus the value of the board and accommodation on the ship, which he estimated at 2*s.* 6*d.* per day or 45*l.* 10*s.* for the year, making altogether a remuneration of 237*l.* 10*s.* Alternatively he took

the actual earnings for the twelve months prior to April 12, 1914, amounting to 184*l.* 4*s.*, and said that this added to the estimated value of the board and lodging, whether taken for the whole fifty-two weeks or for the actual forty-eight weeks the deceased was on board the ship, brought out the total remuneration at less than 250*l.* He accordingly held that the deceased was a "workman" within s. 13 and awarded 300*l.* compensation to the dependants.

The employers appealed.

A. Neilson and *Greaves Lord*, for the appellants. The deceased was not a "workman" within the meaning of the Act. "Remuneration" under s. 13 of the Act includes all such receipts under contracts of service as can be taken into account as "earnings" for the purpose of assessing compensation: *Skailes* v. *Blue Anchor Line*. (1) Fletcher Moulton L.J. dissented in that case, but he laid down certain principles which we crave in aid (see pp. 368, 369). The county court judge regarded the salary as reduced to 16*l.* per month because the ship was lost. But the provision for reduction does not apply when the ship is lost in a gale, and no negligence on the part of the captain could affect it. At no time during the running of the seven years under the former contract was he within the Act, yet it is said that under the new agreement, although the rate of wages is higher, still he is a "workman" entitled to compensation. The appellants did not enforce the provision as to reduction of salary when they thought the captain was not to blame. The county court judge has not taken into consideration the whole of the facts upon which he ought to have decided as to the man's remuneration. Taking an average of the three years preceding his death the captain's wages were 220*l.* a year, and that added to the estimated value of his board would bring him outside the Act: Sched. I. (1.) (*a*) (i.). If the history of the man's employment be taken into consideration, it is apparent that he is outside the Act.

[SWINFEN EADY L.J. Sched. I. (1.) is not applicable to s. 13.]

In order to assess the remuneration the whole circumstances must be regarded. Prima facie when the man started on the

(1) [1911] 1 K. B. 360.

C. A. 1915

WILLIAMS v. S.S. MARITIME (OWNERS).

voyage he was entitled to 240*l.* a year in cash in addition to his board and accommodation. The agreement ought not to be construed in the light of the happening of one event alone. The county court judge only took into consideration the year of employment in which the man lost his life and based his decision upon what happened in that year.

J. H. Layton, for the respondents. Either you must have regard to the contingency which has occurred or estimate what are the probable contingencies. The employment was under a new contract of service which alone can be regarded. Previous happenings under former contracts of service are not material.

Greaves Lord in reply. It is difficult to assess the remuneration under the existing agreement without considering the previous history of the employment. The best materials for coming to a decision are what occurred under the former agreements. The county court judge has wrongly disregarded all that.

Cur. adv. vult.

Feb. 9. LORD COZENS-HARDY M.R. The question in this appeal is whether the deceased captain of the *Maritime* was a person whose remuneration exceeded 250*l.* a year so as not to be a workman within the meaning of the Act (see s. 13). The learned county court judge has held that he was a workman. His contract of service is in writing. It is dated March 13, 1914, and is between the managing owners and the captain, and it provides: "That Captain Thomas Williams takes command of the steamer *Maritime* and performs all the duties thereof to the entire satisfaction of Messrs. William Thomas, Sons & Co., Limited, for and at the rate of wages of twenty pounds (20*l.*) per calendar month and provided the said steamer is kept free of all damage and claims for twelve months the said William Thomas, Sons & Co., Limited, agree as managers for the Maritime Steamship Company, Limited, to pay Captain Williams a gratuity of 48*l.* per annum, but failing to keep the steamer free of damage and claims to steamer the gratuity shall be forfeited and further the salary is to be reduced to sixteen pounds (16*l.*) per month." The *Maritime* was lost with all hands on April 12, that is to

say, before the expiration of one month. In order to answer the question I think you must look at the contract itself, and that you cannot gain much light from what happened under a similar agreement between the captain and the same owners in 1907. Indeed, I doubt whether any such evidence is admissible. Now, if the captain had escaped from the wreck and been asked what was his salary I think he would have been bound to say "My salary is not 20*l.* per calendar month, but only 16*l.*, because the steamer has not been kept free of damage." The remuneration would, of course, include a proper allowance for board and lodging on the ship. The amount of such an allowance has been ascertained by the learned county court judge. But it is agreed that if his salary is to be taken at 16*l.* per month, and not at 20*l.* per month, the limit of 250*l.* is not exceeded. This, in substance, is the view taken by the learned county court judge.

It was contended on behalf of the employers that regard ought to be had to the circumstance that under the prior agreement, the terms of which were less beneficial to the captain, his average remuneration had exceeded 250*l.*, and, further, that regard ought to be had to the fact that the shipowners did not always enforce against an old servant their rights to a reduction of salary unless satisfied that there was real fault on the captain's part. It seems to me that such generosity on the part of the owners cannot be taken into account. The question is, What was the salary to which he was entitled? To answer this question the language of the agreement itself is sufficient. I decline to consider contingencies or probabilities when I have facts to go upon.

In my opinion the decision of the learned county court judge was correct and for the reasons assigned by him.

SWINFEN EADY L.J. The deceased captain of the steamship *Maritime* lost his life in an accident which arose out of and in the course of his employment, and, unless his remuneration exceeded 250*l.* a year, he was a workman within the Workmen's Compensation Act, 1906.

The learned county court judge, upon the basis taken by him,

C. A. 1915

WILLIAMS v. S.S. MARITIME (OWNERS).

Swinfen Eady L.J.

found that his remuneration did not exceed 237*l.* 10*s.* a year, and accordingly the dependants of the workman recovered the statutory compensation. Against this award the employers appeal.

The steamship *Maritime* was lost at sea with all hands. She was last sighted off Rio de Janeiro on April 12, 1914, "in terrific weather," and that is the date when she is presumed to have been lost.

The late Captain Williams on March 17, 1914, sailed from this country with a cargo of coal for Compana, South America, under an agreement in writing with the owners dated March 13, 1914. He had been in the employ of the owners for many years under previous agreements containing different terms, which terms are immaterial, as at the date of the accident he was employed under the said agreement. By that agreement the captain's wages were to be at the rate of 20*l.* per calendar month, and provided the steamer was kept free of all damage and claims for twelve months, the owners agreed to pay him a gratuity of 48*l.* per annum, but failing to keep the steamer free of damage and claims the gratuity was to be forfeited, and, further, the salary was to be reduced to 16*l.* per month. The captain was to find one chronometer and all nautical instruments for the safe navigation of the steamer, and to give up command when required to do so by the owners. His widow, who gave evidence, stated that his wages for each voyage were paid at the end of the voyage. The date when the ship was lost, April 12, 1914, was just before the expiration of the first calendar month from the date of the agreement. The captain had "failed to keep the steamer free of damage," as she was totally lost. The gratuity was, therefore, forfeited and the captain's salary reduced to 16*l.* per calendar month. This works out at 192*l.* per annum, and the value of his board and accommodation on his ship is assessed by the learned county court judge at 45*l.* 10*s.* per annum. These amounts added together make 237*l.* 10*s.* per annum, or a sum not exceeding 250*l.*, and, on this footing, the deceased was a workman within the Act. Any time on shore between voyages and the expense of providing nautical instruments would further reduce his remuneration. If, when the ship was lost, he had

escaped with his life, and returned to England, he could only have claimed wages at 16*l.* per calendar month, and not at 20*l.*, having regard to the terms of the agreement. As the event upon which his salary was to be reduced has actually happened, it is not material to consider what his salary might have amounted to if events had turned out differently.

In my opinion, the judgment of the learned county court judge was right, and this appeal should be dismissed.

PHILLIMORE L.J. The point which we have in this case to determine is whether the husband of the applicant, in respect of whose death she is claiming, was a workman under s. 13 of the Act. This depends, he being a master mariner, upon whether his remuneration does, or does not, (in the language of the section) exceed 250*l.* a year.

The circumstances of his employment were as follows. He had been in the employment of the firm who act as managing owners for the Single Ship Company, which owned the *Maritime*, for about twenty years, first as a master of sailing ships, and, since 1907, of steamships. In 1907 he was appointed to a previous vessel of the same name under an agreement which gave him wages at the nominal rate of 18*l.* per month, with a provision that if the steamer was "kept free of all damage and claims for twelve months" he should have a gratuity of 24*l.* per annum, "but, failing to keep the steamer free of damage and claims," the gratuity shall be forfeited, and further the salary is to be reduced to 16*l.* per month. His services were to begin from the date of joining the steamer, and he was to give up command when required to do so.

The provisions already quoted show that it was in contemplation that the agreement would probably last for several years, as in fact it did.

In 1913 the *Maritime* had an accident and went aground, and after she came back to this country she was sold; and, after a period of rather over a month, during which the deceased was out of employment, he was engaged by the same employers as master of a new *Maritime*, under an agreement which was in the same terms except that the nominal rate of wages was 20*l.*

C. A. 1915

WILLIAMS v. S.S. MARITIME (OWNERS).

Phillimore L.J.

instead of 18*l.*, and the bonus 48*l.* instead of 24*l.* For the purpose of calculating the remuneration of the deceased, there may be added to his wages a sum representing his advantages in the way of board and lodging. The learned county court judge has found, and his figure is not questioned, that this would be at the rate of 17*s.* 6*d.* a week, or, if he was on board ship for the whole year, 45*l.* 10*s.*

He sailed in this ship on March 17, 1914, and on April 12 she was last seen in the South Atlantic Ocean, labouring, we are told, in a heavy storm, and she is presumed to have been lost on that day with all hands.

What we have to determine is whether at the time of his death his remuneration was small enough to bring him within s. 13 of the Act as a statutory workman. Four or five methods of estimating his remuneration present themselves. Counsel for the employers suggested that it should be calculated on an average of what he had actually received in the last three years, basing their contention upon Sched. I., paragraph 1, sub-paragraph 1 (*a*), clause 1, or possibly an average of the last seven years in which he had been in similar employment. As a counterblast counsel for the widow claimed to refer to the last twelve months before his death, founding his point on paragraph 2, clause (*a*). For either of these contentions reliance was placed upon the sums which the man actually received, regardless of the sums to which he was by his agreement entitled. In truth the employers had availed themselves of the clause as to damage for withholding the gratuity, but had not availed themselves of the clause for reduction of salary except on the occasion in 1913 when the ship went aground, and in one of the last three years he had had the gratuity. Therefore, if to the wages be added 45*l.* 10*s.*, or even a less sum, on the average of three years—and possibly of seven—he had received more than 250*l.*, but on the average of the last twelve months less.

The learned county court judge rejected the employers' contention and only relied upon the contention of the widow as a second, or possible, ground for a decision in her favour.

During the course of the argument we intimated that neither of these modes of measurement could be adopted. It is true that

in *Skailes* v. *Blue Anchor Line* (1) the Court got help as to the meaning of the word " remuneration " in s. 13 by taking it as used in the same sense as " earnings " in Sched. I. But, first, this is no warrant for introducing either of the conventional periods of time provided in this schedule into the consideration of clause 13. Secondly, we ought to look at what the man was legally entitled to under his contract, and not to payments or allowances made ex gratia. Thirdly, the agreement of March 13, 1914, is the only one at which we ought to look in order to ascertain the remuneration, though, if we have to estimate as best we can what amount ought to be allowed (*Skailes' Case*, p. 365), we may rightly refer to the events which actually happened in the man's previous employment so as to enable us to calculate the contingency. There remain, therefore, two measures of calculation. One is that adopted by the learned county court judge. He has gone by the event. The ship sank on the assumed date of April 12, 1914. The loss was, he holds, a damage within the meaning of the agreement—her master's wages went down automatically to 16*l.* a month, and, even with board and lodging added, to less than 250*l.* per annum, and therefore he has held that the deceased was a workman. I am not sure whether for this purpose we ought to look at the actual state of things at the death, when certain contingencies have determined, or whether the value of the remuneration for the purpose of determining whether a man is a workman or not is not to be assessed at the time of the engagement—whether, in other words, it may not be an element in the man's engagement that he thereby becomes, or does not become, a workman with a claim under the Act. But if I put my doubt on this point aside, how do I know that at the time of the man's death the contingency had determined? His death may have been after the loss of the ship; or it may be that he was washed off by a wave before; or he and the ship may have perished uno flatu. When the poor man died he may have been entitled to 20*l.* a month. Where survivorship has to be proved the burden lies upon the party claiming to prove it. For these reasons I think the safer course would be to estimate the contingency, remitting the case, if necessary, to the county court

(1) [1911] 1 K. B. 360.

C. A. 1915

WILLIAMS v. S.S. MARITIME (OWNERS).

Phillimore L.J.

judge. There are, however, reasons which make me not unwilling to concur in a judgment dismissing the appeal. I think we can see for ourselves that the great probability is that if the contingency were to be estimated the remuneration would fall below 250*l.*

The managing director, called for the employers, said that in the six years, 1908-1913, there was only one in which there was not an accident doing damage, and that in five of these years the payment at the full monthly rate was ex gratia. In the one year the captain was entitled to the full rate and the bonus. These are the best materials for judging of future averages, with a ship of apparently a similar class under the same management and likely to be engaged in the same sort of voyages. Five years at 16*l.* a month makes 960*l.*: add one year at 20*l.* a month plus gratuity, 288*l.* This gives a total of 1248*l.* Dividing this by 6 gives a figure of 208*l.* per annum. If 45*l.* 10*s.* be added this would make 253*l.* 10*s.* But about three weeks every year, perhaps four, he was ashore, and it would be right to reduce the 45*l.* 10*s.* somewhat. It is not necessary to consider how much or indeed any minutiae because there is an element to which I think sufficient attention has not been paid. This was not a simple engagement for a period—it was an engagement as master of the *Maritime*, and, if the *Maritime* should be lost, the bottom would drop out of the contract. I think an allowance should be made for this contingency—an allowance which would be properly measured by the premium on a policy of marine insurance on the wages: and one can be certain that this would amount to several guineas, and a deduction of this premium would make the remuneration less than 250*l.* per annum.

Therefore I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Holman, Birdwood & Co., for Rogers & Birkett, Liverpool; Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.
1914
Dec. 2, 3.

REID *v.* CUPPER.

Practice—Costs—Two Actions by same Plaintiff against same Defendant—Judgment for Plaintiff in one, for the Defendant in the other—Jurisdiction to set off Costs.

The plaintiff brought an action against the defendant and his wife and another action against the defendant alone; he failed in the first, but succeeded in the second action. The judge at the trial of the second action made an order setting off the plaintiff's costs in the second action against the defendant's costs in the first action:—

Held that, notwithstanding the decision in *David* v. *Rees* [1904] 2 K. B. 435 that Order LXV., r. 14, does not allow the set off of costs in separate proceedings, the decision in *Edwards* v. *Hope* (1885) 14 Q. B. D. 922 showed that the Court had a discretion to allow the set-off by the practice previous to Reg. Hil. Term, 1853, r. 63, and that the set-off was rightly ordered in the exercise of the judge's discretion.

APPEAL of the plaintiff from an order of Scrutton J.

The plaintiff brought an action against the defendant and his wife to recover damages for slander alleged to have been uttered by the wife; the defendants recovered judgment with costs in this action. Afterwards the plaintiff brought another action against the defendant alone, in which he sought to recover damages for assault, wrongful dismissal and false imprisonment; in this action the plaintiff recovered a verdict and judgment for 10*l.* for the assault, and 1*l.* 2*s.* 2*d.* agreed damages for the wrongful dismissal, and the defendant had a verdict on the claim for false imprisonment, the costs to be taxed on the High Court scale. An application was made to Scrutton J., who tried the last-mentioned action, for an order that the costs payable by the plaintiff in the first action should be set off against the costs payable by the defendant in the second action, and on January 28, 1914, Scrutton J. made an order to that effect. He expressed the opinion that, although he could not make the order under Order LXV., rr. 14, 27 (21.), being prevented from so doing by *David* v. *Rees* (1), yet it was plain from *Edwards* v. *Hope* (2) that the old practice before the Rules of 1853 remained in force

(1) [1904] 2 K. B. 435. (2) 14 Q. B. D. 922.

C. A. 1914

REID v. CUPPER.

and gave him a discretion to make the order subject to what he considered just as to the solicitor's lien.

The plaintiff appealed against this order, his notice of appeal being "that so much of the order of January 28, 1914, as ordered that the plaintiff's costs in this action should be set off against the costs," namely, 97*l.*, "which the defendants ought to receive in the action of *Reid* v. *Cupper and Wife* be reversed, and alternatively that it may be ordered that such set-off may be without prejudice to the lien herein of the plaintiff's solicitor for the costs of this action."

J. B. Matthews, K.C. (*H. S. Simmons*, with him), for the plaintiff. The argument appears clearly from the judgments. [He cited *Hall* v. *Ody* (1); *Randle* v. *Fuller* (2); *Middleton* v. *Hill* (3); *Cowell* v. *Betteley* (4); *Dunn* v. *West* (5); *Wright* v. *Mudie* (6); *Barker* v. *Hemming* (7); *Edwards* v. *Hope* (8); *Blakey* v. *Latham* (9); *Hassell* v. *Stanley* (10); *Goodfellow* v. *Gray* (11); *David* v. *Rees* (12); *Bake* v. *French* (13); *In re Harrald* (14); *Cuenod* v. *Leslie*. (15)]

Clavell Slater, K.C., and *Storry Deans*, for the defendant, were not called upon to argue.

BUCKLEY L.J. This is an appeal by the plaintiff Reid against a decision of Scrutton J. by which he ordered a set-off of the costs of the defendant in one action against the costs of the plaintiff in another action. The plaintiff sued the defendant and his wife for damages for a slander uttered by the wife. In that action the defendants succeeded, and the plaintiff was ordered to pay the costs of the action. Subsequently an action for assault, wrongful dismissal, and false imprisonment was brought by Reid against the husband alone. In that action the plaintiff recovered

(1) (1799) 2 Bos. & P. 28.
(2) (1795) 6 T. R. 456.
(3) (1813) 1 M. & S. 240.
(4) (1834) 10 Bing. 432.
(5) (1850) 10 C. B. 420, at p. 427.
(6) (1823) 1 Sim. & St. 266.
(7) (1880) 5 Q. B. D. 609.
(8) 14 Q. B. D. 922.
(9) (1889) 41 Ch. D. 518.
(10) [1896] 1 Ch. 607.
(11) [1899] 2 Q. B. 498.
(12) [1904] 2 K. B. 435.
(13) [1907] 1 Ch. 428.
(14) (1883) 52 L. J. (Ch.) 435; (1884) 53 L. J. (Ch.) 505.
(15) [1909] 1 K. B. 880.

a verdict and judgment for 10*l.* damages for assault and 1*l.* 2*s.* 2*d.* agreed damages for the wrongful dismissal, and there was a verdict for the defendant on the claim for false imprisonment, the costs to be taxed upon the High Court scale. An application was then made to the learned judge to set off the costs payable by the plaintiff in the slander action against the costs payable to the plaintiff in the assault action, and the learned judge made an order for a set-off. This appeal is against that order. The notice of appeal asks "that so much of the order of January 28, 1914, as ordered or directed that the plaintiff's costs in this action should be set off against the costs, viz., 97*l.*, which the defendants ought to receive in the action *Reid* v. *Cupper and Wife* be reversed, or, alternatively, that it may be ordered that such set-off shall be without prejudice to the lien herein of the plaintiff's solicitor for the costs of this action." We have to consider what are the rights between the parties with regard to set-off in such circumstances as those. Nothing turns upon the fact that the husband and wife were joint defendants in the action for slander in which they succeeded, and that the husband only was defendant in the action in which the plaintiff succeeded. The question is as regards a right of set-off having regard to the solicitor's lien for costs.

Before the year 1832—speaking of the common law jurisdiction to the exclusion of that of the Court of Chancery—there was recognized what was called an equitable jurisdiction (that is to say, a jurisdiction to do that which was fair) to order a set-off. It is described by Brett M.R. in *Edwards* v. *Hope* (1) thus: "The Courts always had an equitable jurisdiction, for the purpose of preventing absurdity or injustice in cases where there had been judgments for damages between the same parties in distinct actions, to set off one judgment against the other and to allow execution to issue in respect of the balance only." Mr. Matthews has cited cases which show that this was not confined to cases of judgments for damages, but extended to judgments for costs. There always was this so-called "equitable jurisdiction" to set off one judgment against the other, and execution issued only for the balance. It seems to have been

(1) 14 Q. B. D. at p. 926.

C. A. 1914

REID v. CUPPER.

Buckley L.J.

done in this way: where there had been a judgment pronounced in the first action and also in the second action, the judgment in the first action could be brought before the Court on affidavit to prove that it had not been satisfied, and thereupon the Court exercised the so-called equitable jurisdiction to set off the one against the other.

That being the law before 1832, in 1832 there were passed the Reg. Gen. Hilary Term 2 Will. 4, of which r. 93, is in these words: "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided nevertheless that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." The fact that "the particular suit" is mentioned there shows that there was in contemplation some other suit or action. In 1853 the rules of that year were passed, and r. 93 was reproduced in identical terms. That state of things continued until the Judicature Act, 1873, came into force. Order LXV., r. 14, then provided exactly the contrary of that which had been the previous rule. The previous rule said that there should be no set-off allowed; this rule says that a set-off may be allowed. This rule is in these terms: "A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." Upon that rule there has arisen a contest as to whether or not it applies to a case in which it is sought to set off costs in two independent actions.

It must be remembered that before the Judicature Act a set-off of damages could not arise except where there were two independent actions; there could not be claim and counter-claim in the same action. In 1832 and 1853 therefore "no set-off of damages" must have meant damages in separate actions. After the passing of the Judicature Act that is not so; there can be claim and counter-claim. It has been argued by Mr. Matthews that the occurrence of the word "damages" in Order LXV., r. 14, does not assist the argument. I do not agree. That rule is a reproduction of the rule of 1853 with an alteration. I think the word "damages" must mean the same thing in both rules.

C. A. 1914

REID v. CUPPER.

Buckley L.J.

I must, however, see what are the authorities. Before discussing *Barker* v. *Hemming* (1) I may observe that I am considering the powers not of a taxing Master but of a judge to direct a set-off. There is another rule, Order LXV., r. 27, sub-r. 21, directing what a taxing Master may do. That rule says: "In any case in which, under the last preceding regulation or any other rule of Court, or by the order or direction of a Court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off," and so on. That is addressed to what the taxing Master may do. It was held that under that rule the taxing Master could not order costs payable under independent interpleader proceedings to be set off against costs due in the original action. This was *Barker* v. *Hemming*. (1) It was a decision that the power of the taxing Master was limited and that he could not order a set-off in that case. In *Edwards* v. *Hope* (2), which was an application to set off cross judgments, it was held that "The Court, upon an application to set off cross judgments in distinct actions, are entitled, notwithstanding Order LXV., r. 14, to order that the set-off shall be subject to the lien for costs of the solicitor of the opposite party, for, assuming that r. 14 applies to a set-off in distinct actions, it leaves the Court a discretion to allow the set-off either subject to or notwithstanding the solicitor's lien." Brett M.R., after discussing the old practice, as I have stated it, went on to say that it was not necessary to say whether Order LXV. applied or not; that if it did apply, the Court had a discretion; but if it did not apply, the old practice before 1853 remained by which the Court had a discretion. In *David* v. *Rees* (3), a decision of this Court, the head-note is: "The provisions of Order LXV., r. 14, and Order LXV., r. 27, sub-r. 21, with regard to set-off of costs between parties are confined to cases in which the judgments for costs sought to be set off against each other are in the same action or proceeding, and do not extend to cases in which the judgments for costs are in distinct and independent litigations."

(1) 5 Q. B. D. 609. (2) 14 Q. B. D. 922.
(3) [1904] 2 K. B. 435.

C. A. 1914

REID v. CUPPER.

Buckley L.J.

On turning to the judgment, I find that the Court, after referring to *Barker* v. *Hemming* (1), decided that Order LXV., r. 14, does not allow the set-off of costs in separate proceedings. *David* v. *Rees* (2) binds us. But I do not think it disposes of this case, because, upon the decisions in *Edwards* v. *Hope* (3) and *David* v. *Rees* (2) (both decisions of the Court of Appeal), this follows: either Order LXV., r. 14, applies, or it does not. *David* v. *Rees* (2) says it does not apply; but if it does not apply, *Edwards* v. *Hope* (3) says there remains that which was the jurisdiction of the Court before 1832 or 1853 and there is still a discretion in the Court. Upon that ground I think the learned judge was right in holding that he had a discretion to allow a set-off; and if he has jurisdiction we simply affirm his order.

In the case of *Bake* v. *French* (4) there was a question of costs in independent proceedings; and in that case Parker J. says: "Now, I think I must take it, on the authority of *David* v. *Rees* (2), that the provisions of Order LXV., rr. 14 and 27, sub-r. 21, have no application to costs incurred in independent proceedings. Having regard to that case and also to the case therein cited of *Barker* v. *Hemming* (1) I do not think I can treat these two actions as other than independent proceedings, unless it be by reason of the order for consolidation to which I have referred." But, as I understand, it was always within the jurisdiction of the Court to deal with this matter in its discretion as it thought proper. The practice differed in the various Courts; but in this case I think the learned judge was entitled to exercise and did exercise a discretion. Although bound by *David* v. *Rees* (2), I think there was a discretion and that this appeal must be dismissed.

PHILLIMORE L.J. I am of the same opinion, and the observations I shall make are purely supplemental to what Buckley L.J. has said. With regard to the case of *Edwards* v. *Hope* (3) that was the first decision on Order LXV., r. 14; and no doubt the Divisional Court thought that Order LXV., r. 14, did not apply to different actions. The only way in which we could understand

(1) 5 Q. B. D. 609.
(2) [1904] 2 K. B. 435.
(3) 14 Q. B. D. 922.
(4) [1907] 1 Ch. 428.

the language as to set-off would be by supposing that there might be damages given to the plaintiff on his claim, and some other damages given to the defendant on his counter-claim; and that suggestion is mentioned by one of the learned judges in the Court of Appeal. On that slender foundation the Court might have thought that Order LXV., r. 14, might be confined, as the old rules were, to costs where there were damages to both plaintiff and defendant in the same action. The Court also based its decision on the ground that, if it was not so, the judges had a discretion and that they should exercise it against the set-off and in favour of the solicitor's lien. I think that the decision of the Court of Appeal went entirely upon the question of discretion; and for that purpose the Court used this dilemma; either Order LXV., r. 14, applies, or it does not. If it applies, we have discretion; if it does not apply, then, under the old rule, we have a discretion. That takes us back to the old law, and Mr. Matthews' very able argument was mainly devoted to proving to us that the three judges in the Court of Appeal had been mistaken as a matter of history with regard to the old law. I do not think they were mistaken. The old law led to a different course of practice in the three superior Courts of common law, the King's Bench, the Common Pleas, and the Exchequer. There could not have been a difference in the practice if it had been a matter of substantive law. All that the Court of Appeal meant by its decision was that, there being a discretion, the different Courts had by habit or custom taken different views relative to the question of discretion. I am not sure that that can be truly said of the Court of Exchequer, but the King's Bench certainly took one view and the Common Pleas another. When exercising what John William Smith in his "Action of Law" calls "equitable jurisdiction" in the superior Courts, they conceived that they had discretion as to whether or not they would allow one judgment to be set off to the prejudice of the attorney's claim; and I think that the judges in the Court of Appeal in *Edwards* v. *Hope* (1) were right when they said there was this discretion. The discretion had been suspended from the year 1832 to the date when Order LXV., r. 14, was

(1) 14 Q. B. D. 922.

C. A. 1914

REID v. CUPPER.

Phillimore L.J.

passed; the discretion had been taken away under the General Rules of 1832 (3 B. & A. 388) and by the General Rules of 1853 (the rules in each case are in identical words). Order LXV., r. 14, looks as if it was intended to repeal that rule, because it traverses, modo et forma, the language of the previous rule, the only difference being that it says "cause or matter" instead of "suit." In the earlier rules there was a proviso that in each action the costs of an interlocutory proceeding might be set off. Otherwise, it was said that the costs should not be set off in derogation of the attorney's lien. But Order LXV., r. 14, repeals that rule and, of course, omits the proviso. Having regard to Order LXV., r. 27, sub-r. 21, I see very great difficulty in giving force to Order LXV., r. 14, except, possibly, where there is a question of damages on a claim and on counter-claim, unless it has the meaning that it refers to independent actions. I think we are bound by the decision in *David* v. *Rees* (1) that the rule only applies to proceedings in the same action; but we are not prevented from following the decision in *Edwards* v. *Hope* (2) that the repeal of the rules of 1832 and 1853 restores the equitable jurisdiction of the Courts and enables us to approach this question as one of discretion. No doubt in the cases of *Blakey* v. *Latham* (3) and *Hassell* v. *Stanley* (4) the learned judges of first instance did, very reluctantly, follow *Edwards* v. *Hope* (2), and exercise their discretion in favour of the attorney's lien. The case of *Hassell* v. *Stanley* (4) is not, I think, very satisfactorily reported. It really was a decision on an application for a certiorari treating that application as a separate action from the county court action. These cases are mere instances in which the judges of first instance thought that the leaning was so strong in *Edwards* v. *Hope* (2) that they ought to exercise their discretion in favour of the attorney's lien. They not being decisions of law at all, we approach this case on the footing that there is a discretion; and I think that Scrutton J. has rightly exercised his discretion.

Mr. Matthews said that a letter had been written by his solicitor-client in which he offered to consolidate the two actions

(1) [1904] 2 K. B. 435.
(2) 14 Q. B. D. 922.
(3) 41 Ch. D. 518.
(4) [1896] 1 Ch. 607.

C. A. 1914

REID v. CUPPER.

Phillimore L.J

into one action. Well, Scrutton J. had that before him, and he did not think, having regard to the whole case, that there was any reason for not doing that which he otherwise thought he ought to do, namely, allow the set-off. There are no other materials upon which we can interfere with his decision. There was a minor point about the judgment being in favour of husband and wife in the first action and against the husband only in the second action, and that so the husband and the wife are joint creditors. Buckley L.J. has, I think, given the true answer with regard to that; and I see no reason why, merely because the husband and the wife are joint creditors, the discretion should not be exercised in favour of the husband. Therefore this appeal fails.

PICKFORD L.J. I have very little to add to what has already been said. It would be a serious proposition if, however much a solicitor had multiplied his costs, the Court were powerless to prevent him from getting out of the adverse party the costs due from his own client which their client might not be able to pay. It has been said that Order LXV., r. 14, does not apply to this case; and I agree that we are bound, following the case of *David* v. *Rees* (1), to say that it does not apply. The position now is that, by the joint effect of *Goodfellow* v. *Gray* (2) and *David* v. *Rees* (1), Order LXV., r. 14, applies to a set-off of damages in independent proceedings but not to set-off of costs. That is a remarkable result, but we are bound by those decisions. I must say respectfully that I am unable to follow the reasoning in *David* v. *Rees* (1); but we are bound by it and must follow it.

With regard to the second point, namely, that under those circumstances the case has to rest upon the old jurisdiction as to costs, I agree; but with regard to the second part of the proposition, that, according to the old jurisdiction of the Courts, this lien must be allowed, I do not agree. I think the result of the old practice was that the Courts had a discretionary power to allow this set-off, and a discretion as to the terms upon which they would allow it. The Court of King's Bench decided to exercise its discretion in one particular way, the Court of

(1) [1904] 2 K. B. 435. (2) [1899] 2 Q. B. 498.

C. A. 1914

REID v. CUPPER.

Pickford L.J.

Common Pleas laid down a different and directly opposite rule. The Court of Chancery exercised its discretion in the same way as the Court of King's Bench, and the Court of Exchequer exercised its discretion according to circumstances. The different Courts exercised their discretion in different ways. In *Edwards* v. *Hope* (1) the Court of Appeal expressly decided the point that the Courts, in exercising the old jurisdiction, exercised it with discretion as to the terms on which it was to be exercised. I thoroughly agree that we are bound by the decision in *David* v. *Rees* (2). In this case the learned judge has exercised his discretion, and it has hardly been challenged that it was a perfectly proper exercise of his discretion. The reasons for thinking so could not be put better than in the admirable way in which they are put by Kay J. in *Blakey* v. *Latham* (3), that there might be a great injustice in a case where the client was not able to pay if the successful defendant in the first action were made to pay the plaintiff's solicitor's costs in the second action which the plaintiff ought to pay himself.

I agree that this appeal must be dismissed and the judgment of Scrutton J. upheld.

Appeal dismissed.

Solicitors: *Windybank, Samuell & Laurence; Richardson, Sadlers & Collard.*

(1) 14 Q. B. D. 922. (2) [1904] 2 K. B. 435.
(3) 41 Ch. D. 518.

W. J. B

FLUDE, LIMITED *v.* GOLDBERG.
ISAACS, CLAIMANT.

1915
Jan. 13.

Interpleader—Practice—Right of Claimant to rely on a Title other than that which Issue directed to try.

Goods having been seized in execution of a judgment recovered against one of two partners, the other partner claimed them as his sole property. At the trial of an interpleader issue directed to try the validity of that claim the jury found that the goods were the property of the partnership :—

Held, that the fact of the claimant having claimed under a title which he failed to prove did not preclude him from relying upon the title found, and that upon the issue he was entitled to the goods as against the execution creditor.

APPEAL from the judgment of the county court of Leicester on an interpleader issue.

In October, 1911, judgment was recovered in the High Court by Flude, Limited, against H. Goldberg for the price of goods sold and delivered. On April 4, 1914, execution was issued on that judgment, and the sheriff of Nottingham seized certain articles of jewellery upon premises at 5, Carrington Street, Nottingham. Those premises were occupied by Reeves & Co. under a tenancy agreement dated February 19, 1914, and made between the lessor and H. Goldberg and G. Reeves (trading as G. Reeves & Co.). On April 14 a notice signed G. Reeves & Co. was handed to the sheriff stating that the goods seized were not the goods of the defendant Goldberg, and on the same day Maurice Isaacs made an affidavit in which he swore that he was G. Reeves & Co., that the goods seized were his property, and that Goldberg had no interest in them. On the faith of this affidavit the sheriff interpleaded and an order was made that the interpleader proceedings should be transferred to the county court and that upon payment of 85*l.* to the sheriff by G. Reeves & Co. the sheriff should withdraw from possession. The sum of 85*l.* was duly paid to the sheriff, who thereupon withdrew. On June 9 Isaacs in his own name filed particulars of his claim in which he stated that "the grounds of my claim are that the said goods and chattels were purchased by me out of

1915

FLUDE, LIMITED v. GOLDBERG.

my own proper moneys, or upon my own proper credit from the following firms" whose names he proceeded to state. The interpleader issue was tried before the judge with a jury on July 3. It appeared that Maurice Isaacs traded as a "roving auctioneer" in various towns, selling his own goods at mock auctions, under the following names: "G. Reeves," "Reeves & Lyons," "G. Reeves & Co.," and "Lambert & Co." The evidence of the claimant was directed to prove that he was the sole owner of the goods, while the cross-examination on behalf of the execution creditors and the evidence of their witnesses were directed to show that Goldberg was a partner of Isaacs and that the goods were partnership property. Although the partnership was strenuously denied by Isaacs, his counsel contended that even if the goods were in fact the property of Isaacs and Goldberg as partners, still Isaacs would have such an interest in them as would support his claim notwithstanding the form of it and the evidence which he had given. No application was made to amend, and the case proceeded on the claim as appearing on the record.

The judge left the following questions to the jury:—1. Were the goods in question the goods of Maurice Isaacs alone? Answer.—No. 2. Were they the goods of Goldberg and Isaacs as partners? Answer.—Yes. On those findings he held that Maurice Isaacs had not made out his claim, and that, even if a claim by him as partner would otherwise be good as against the execution creditors, he could not set up a partnership which he had deliberately, both by his affidavit and also at the trial, sworn not to exist. The claimant appealed.

H. J. Rowlands, for the claimant. The execution creditor had no title whatever to the goods, nor to the money in Court which represented them, for the execution was bad ab initio. By s. 23 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), it is expressly provided that "a writ of execution shall not issue against any partnership property except on a judgment against the firm." The county court judge relied upon the case of *Wells* v. *Hughes* (1), but that case is distinguishable. There the

(1) [1907] 2 K. B. 845.

claimants claimed the goods under a bill of sale and paid into Court a sum of money as representing their value, whereupon the high bailiff withdrew from possession. Subsequently a third party claimed title to a portion of the goods, a claim which was assented to both by the claimants and by the execution creditor. On the trial of the issue the claimants' bill of sale was found to be void. Under those circumstances the question was to whom did the portion of the money in Court representing the goods not claimed by the third party belong, neither party to the issue admittedly having had any title to those goods. It was held by the Court of Appeal that as the claimants had failed to make out a title to any of the goods the whole of the money in Court must be paid to the execution creditor. But there the claimants had no title at all and endeavoured to rely on the jus tertii, whereas here the claimant has a title, though it differs somewhat from the title claimed. In any case Isaacs had as a partner a lien on the partnership assets for the purpose of satisfying the partnership liabilities, and such a lien is a sufficient title against the execution creditor. The effect of the county court judge's judgment is most unjust, for it orders the money of A. to be applied in payment of the debt of B.

Wightman Powers, for the execution creditors. It is not enough that the claimant should have a title to the goods; he must, in order to succeed, prove the title under which he claims in his particulars of claim. He is bound by his pleading. By Order xxvii., r. 5, of the County Court Rules the claimant must five clear days before the return day deliver "particulars of any goods or chattels alleged to be the property of the claimant, and of the grounds of his claim." The issue directed to be tried was whether the goods seized were his as against the execution creditors. The jury found they were not, but were the goods of the partnership. The practice in interpleader is strict, and does not allow of the claimant travelling outside the issue or of the particulars of his claim. So far from the decision in favour of the execution creditors being unjust, it would be very unjust to allow the claimant to amend his claim. If he had claimed the goods as partnership assets, as he ought to have done, the execution creditors would have had an opportunity of applying for

1915

FLUDE, LIMITED v. GOLDBERG.

the appointment of a receiver. But by claiming them as his own property he misled the execution creditors into allowing the time to go by within which such an application could be made. When once money has been paid into Court under s. 156 of the County Courts Act, 1888, it is too late to apply for a receiver, for the goods from that date become free goods, and a second execution cannot be levied on them in respect of the same judgment; while no receiver can be appointed in respect of the portion of the money in Court which does not represent the claimant's share of the partnership assets, for the money is paid in "to abide the decision of the judge upon such claim." The county court judge ought not to have left to the jury the question whether the goods were the property of Goldberg and Isaacs as partners, that question being perfectly irrelevant. On an interpleader issue the only question is whether the claimant has made out his claim to the goods: *Green* v. *Rogers*. (1) If he has not, the execution creditor, although he may admittedly have no title at all, succeeds because he is in possession by the sheriff.

RIDLEY J. In this case there must be judgment for the appellant. Mr. Powers has endeavoured to apply the principles of the cases on which he relies to facts to which they are not applicable. An action was brought by the plaintiffs, Flude, Limited, against Goldberg in 1911 and judgment was recovered, but no effective execution was then levied. In 1914 Goldberg had got into business relations with Isaacs, and a shop was taken in which they kept certain goods. The sheriff, in execution of the judgment obtained against Goldberg, seized the goods in the shop. Isaacs claimed the goods and the sheriff interpleaded. Isaacs in his affidavit and in his particulars of claim said that the goods were the property of Reeves and Co., that he, Isaacs, was trading alone under the name of Reeves and Co., that the goods were his, and that Goldberg had no interest in them. The question in the interpleader was whether the goods were the property of Isaacs as against the execution creditors. The judge left to the jury two questions, first whether the goods were the property of Isaacs alone, and secondly whether they were the property of Isaacs and

(1) (1845) 2 Car. & K. 148.

1915

FLUDE, LIMITED v. GOLDBERG.

Ridley J.

Goldberg as partners. There was some evidence that Goldberg had an interest in them because the lease of the shop was taken in his name. The jury found that the goods were partnership goods. The effect of that finding was to show that the execution was void, because s. 23 of the Partnership Act, 1890, provides that "a writ of execution shall not issue against any partnership property except on a judgment against the firm," and here there was no judgment against the firm. Therefore the execution creditors had no title to the goods. But notwithstanding that fact, and that Isaacs had an interest in the goods as partner, the judge held that Isaacs had not made out his claim against the execution creditors, because he had not succeeded in establishing the particular claim that he had put forward, namely, that he was the sole owner of the goods. He held that, even if a claim by him as partner would otherwise be good as against the execution creditors, he could not set up a partnership which he had deliberately, both by his affidavit and also at the trial, sworn not to exist. In my opinion the fact of his having claimed under a title which he was found not to have did not estop him from relying on a title which he was found to have, as against the execution creditors who had no title at all. The judge has found that the goods were the property of the execution creditors, and that they certainly were not.

LAWRENCE J. I am of the same opinion. Mr. Powers succeeded in persuading the county court judge to adhere to certain technical rules of the practice in interpleader, and to rely on certain authorities which in my opinion have no application to the facts of this case. The claimant claimed to be the sole member of the firm of Reeves & Co., whose property he alleged the goods seized to be. The judge left it to the jury to say whether the goods were his sole property or whether Goldberg was a partner in the firm. The jury found the latter, and that the goods were the property of the partnership. Under those circumstances it is clear that they were not liable to execution at the suit of a creditor of one of the partners. But Mr. Powers says that the law of interpleader is very strict, and that the claimant must succeed on the strength of his own title as

1915

FLUDE, LIMITED v. GOLDBERG.

Lawrence J.

claimed, and not on the weakness of the execution creditors' title; and for that he relies on the cases of *Green* v. *Rogers* (1) and *Wells* v. *Hughes*. (2) In the former of those cases it was no doubt held that in an interpleader issue the question whether the execution creditor has any title or not is perfectly immaterial, and that the only question is whether the goods are the property of the claimant. But there it must be inferred from the finding of the jury that the claimant had no title at all, whereas here Isaacs had a title, although a different one from that which he claimed. In *Wells* v. *Hughes* (2) also the claimants had no title at all to the goods, for they claimed under a bill of sale which was held to be void, and there was no suggestion that they had any other title. In the present case the jury did not find what the extent of Goldberg's interest in the partnership assets was; it may have been trifling, and the law can hardly be in such an absurd condition that, where the judgment debtor has an infinitesimal interest in the goods as co-partner with the claimant, the mere fact that the claimant omitted in his claim to mention the debtor's interest will cause the whole value of the goods to go to the execution creditor. In this case Goldberg's interest may have been worth one or two pounds, while the goods may have been worth thousands, and yet according to Mr. Powers the whole value is to be forfeited and must go to pay Goldberg's debt. That is a contention which could hardly be supported at the present day. I agree that there must be judgment for the appellant.

Appeal allowed.

Solicitor for claimant: *A. De Frece, for J. J. Spencer, Nottingham.*

Solicitor for execution creditors: *Vizard, Oldham & Co., for Owston, Dickinson & Co., Leicester.*

(1) 2 Car. & K. 148. (2) [1907] 2 K. B. 845.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1915
March 1.

ZIMAN *v.* KOMATA REEFS GOLD MINING COMPANY, LIMITED.

[1915 Z. 50.]

Injunction—Mortgage—Realization of Securities—"Mortgagee in possession"—Personalty—Courts (Emergency Powers) Act, 1914 (*4 & 5 Geo. 5, c.* 78), *s.* 1, *sub-s.* 1 (*b*).

On July 30, 1913, the plaintiff signed a memorandum of deposit whereby in consideration of their advancing to him by way of loan 4000*l.* he deposited with the defendant company 5000*l.* Progress Mines of New Zealand debentures, secured on personal estate, to be held by them as collateral security for the repayment of the loan; he authorized them to sell the security if the loan and interest were not paid at maturity, and to call in the loan on or after January 30, 1914, by giving sixty days' notice.

The debentures were forthwith transferred to and registered in the names of two of the directors of the company. They received the interest on the debentures and applied it towards payment of interest on the loan; but the latter was not paid in full, and on November 14, 1914, they gave notice to call in the loan, and that they intended to sell the debentures. The plaintiff obtained an order ex parte in chambers under s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, restraining the defendants from disposing of the debentures until after the hearing of a summons dealing with the question :—

Held (affirming the decision of Lord Coleridge J.), that the defendants were mortgagees in possession within the exception to s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914 (1); that that exception

(1) Courts (Emergency Powers) Act, 1914, s. 1:

"(1.) From and after the passing of this Act no person shall—

"(*a*) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this sub-section applies, except after such application to such Court and such notice as may be provided for by rules or directions under this Act; or

"(*b*) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this sub-

C. A.

1915

ZIMAN
v.
KOMATA REEFS GOLD MINING COMPANY, LIMITED.

was not confined to mortgagees of real estate; that there was no distinction between mortgagees who had taken possession adversely and others; and that the plaintiff was not entitled to restrain the company from selling the debentures.

APPEAL from a decision of Lord Coleridge J.

The plaintiff claimed an injunction to restrain the defendants from taking or entering into possession of or realizing 5000*l.* Progress Mines of New Zealand, Limited, first charge 5 per cent. debentures deposited by the plaintiff with the defendants as security for a loan of 4000*l.* made on July 30, 1913, without the leave of the Court pursuant to the Courts (Emergency Powers) Act, 1914.

On July 30, 1913, the plaintiff, David Ziman, signed a memorandum of deposit as follows:—

"To the Komata Reefs Gold Mining Company, Limited. . . . . In consideration of your advancing to me by way of loan the sum of 4000*l.* (four thousand pounds) I deposit with you 5000*l.* Progress Mines of New Zealand Limited first charge 5 per cent. debentures redeemable at par between the 2nd November, 1913, and the 2nd May, 1917, principal and interest guaranteed by The Consolidated Goldfields of New Zealand, Limited, to be held by you, or registered in your own or your nominees' names as collateral security for the repayment of the same and interest thereon at the rate of ten per cent. per annum, payable quarterly on 30th October, 31st January, 30th April and 30th July respectively.

"I authorise you to sell or dispose of this security in case the said loan and interest be not paid at maturity, or in the event of the market price of the security being below 5 per cent. in excess of the amount owing.

"You are at liberty to call in the whole or any part of the loan on the 30th January, 1914, or any subsequent date by giving sixty days' notice by post to the above address.

---

section applies, for the purpose of enforcing the payment or recovery of any sum of money to which this sub-section applies, or, in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided for by rules or directions under this Act."

"This security to extend to any other sum or sums of money as to which I may be or become indebted or liable to you.

"It being the intention that as part consideration for the loan you were to retain an option to call 1250 Blackwater Mines Limited shares at 22/6 any time up to the 2nd May, 1916, it is hereby agreed that should you not have exercised the conversion of 1395*l.* debentures prior to the redemption of the loan, you are to have the right to continue 1116*l.* of the loan up to the 2nd May, 1916, or conversion into Blackwater shares.

"I am, Gentlemen,

"Your obedient servant,

"David Ziman."

The debentures, which were charged on personal estate only, were forthwith transferred to and registered in the names of two of the directors of the defendant company. They received the interest on the debentures and applied it towards payment of the interest on the loan; but the latter was not paid in full, and on November 14, 1914, the defendants wrote to the plaintiff that in the circumstances they had "no alternative but to give you the sixty days' notice required by the agreement to call in the whole of the loan. This we hereby give. We also give you notice that we shall sell or dispose of the securities deposited at the expiration of this notice."

On January 18, 1915, an order was made by the judge in chambers restraining the defendants from dealing with the shares until after the hearing of a summons in the matter; and on February 9, 1915, Lord Coleridge J. made an order on the summons whereby he discharged his order of January 18.

The plaintiff appealed.

Compston, K.C., G. W. H. Jones, and *Albert Crew*, for the appellant. The respondents ought not to be allowed to realize these debentures during the war, for it will be almost impossible to find a purchaser and get a fair price for them. By s. 1, sub-s. 1 (*b*), and sub-s. 2 of the Courts (Emergency Powers) Act, 1914, it is provided that no person shall "realise any security" except after an application to the Court for leave to proceed; but that provision is subject to the exception "except by way of sale

C. A. 1915

ZIMAN v. KOMATA REEFS GOLD MINING COMPANY, LIMITED.

by a mortgagee in possession." The respondents are not mortgagees in possession. That expression is limited in the Act to mortgagees of real estate, and no real estate is comprised in these debentures, and to mortgagees who have done some act adversely to the mortgagor with a view to obtaining possession and have not obtained it, as in this case, with the consent of the mortgagor.

On the first point it is submitted that this Act is remedial and should be given the fullest possible scope: *Sullivan* v. *Mitcalfe*. (1) The Court will take other parts of the Act into consideration in determining the sense in which an expression is used: *Colquhoun* v. *Brooks*. (2) At the date of the Act there was no market for this class of security, and the Legislature intended to protect people who had borrowed money on such securities from the loss which would be caused by a forced sale. A moratorium was proclaimed and the Stock Exchange closed. These considerations do not apply to real estate, for that could be sold at any time with a reasonable prospect of getting a good price for it. By s. 2 in the application of the Act to Scotland the words "creditor in a heritable security" are substituted for "mortgagee." That shows that in s. 1, sub-s. 1 (*b*), the word mortgagee means mortgagee of real estate, for it must have been intended that the law should be the same in both countries. Choses in action such as these debentures would be described in Scotland as movable, not as heritable: Paterson's Compendium of English and Scotch Law, 2nd ed., par. 715. It is not contended that a pledgee of chattels is not a mortgagee for all purposes—*Blackwood* v. *The Queen* (3); *Harrold* v. *Plenty* (4); *Stubbs* v. *Slater* (5)—but that he is not a mortgagee in possession within the exception to this sub-section. Secondly the Act says that mortgagees are not to take possession without leave, but persons who have already taken possession are excepted. That refers to persons who have taken possession adversely to the debtor, not to persons who have had possession given to them as in this case. The mortgagee must show that he has done some adverse act as the result of which he is in possession.

Douglas Hogg was not called upon to argue.

(1) (1880) 5 C. P. D. 455, 458.
(2) (1889) 14 App. Cas. 493, 506.
(3) (1882) 8 App. Cas. 82, 96.
(4) [1901] 2 Ch. 314.
(5) [1910] 1 Ch. 632.

C. A. 1915

ZIMAN v. KOMATA REEFS GOLD MINING COMPANY, LIMITED.

LORD COZENS-HARDY M.R. This is an appeal from an order of Lord Coleridge J. in chambers, by which he refused to continue an ex parte injunction which had been granted by him. It raises a point under the Act of 4 & 5 Geo. 5, c. 78, the short title of which is the Courts (Emergency Powers) Act, 1914. The question is whether a sale which, according to the terms of an instrument which I am about to read, is clearly authorized can be effected by the defendants, or whether such a sale is liable to be stayed under the provisions of the statute. [His Lordship stated the facts and continued.] The question turns upon the meaning of a few words in the Act. The Act provides that: "1.—(1.) From and after the passing of this Act"—which was August 31—"no person shall (*a*) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this sub-section applies, except after such application to such Court and such notice as may be provided for by rules or directions under this Act." That does not apply to the present case; there is no order of the Court involved in the present case. Next we have these words: "No person shall"—sub-s. 1 (*b*)—"levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security"—and then come these words—"(except by way of sale by a mortgagee in possession)." Now, what is this security? Is it a mortgage? Mr. Compston, who has argued every point that could be raised, says that that is not disputed. Are the defendants mortgagees in possession? That again is not and cannot be disputed according to the ordinary meaning of terms as understood in this Court to be applicable to English law. It seems to me that it is impossible to escape from the conclusion that the defendants here fall within the description of mortgagees in possession, unless we are to twist the construction of these words by reason of something else in the Act. It is said that this only applies to a mortgagee in possession of real estate. Why? It is impossible to suggest any reason for such an exception. Mortgagees in possession of personal property are perfectly common; enormous

C.A. 1915

ZIMAN v. KOMATA REEFS GOLD MINING COMPANY, LIMITED.

Lord Cozens-Hardy M.R.

sums of money are advanced in the City by banks and other persons who are mortgagees in possession of debentures, or shares, or other choses in action. Why are they not within the words? I confess I cannot see any reason, unless it is this: it is said that, although "mortgagee in possession," according to the English law, is a perfectly general term, yet you find sufficient in the section which applies the Act to Scotland to give it a narrower meaning. It says this: "Sect. 2.—(2.) In the application of this Act to Scotland the Court of Session shall be substituted for the Lord Chancellor; 'Act of Sederunt' shall be substituted for 'rules'; 'a petition for sequestration' shall be substituted for 'a bankruptcy petition'; 'diligence' shall be substituted for 'execution'; and 'decree' shall be substituted for 'judgment or order,' and shall be deemed to include any warrant authorising diligence; 'creditor in a heritable security' shall be substituted for 'mortgagee'; and 'proceedings in removings and ejections in the case of subjects let at a rent not exceeding twenty-one pounds' shall be substituted for 'proceedings for the recovery of possession of tenements under the Small Tenements Recovery Act, 1838.'" We are asked to say that, because in Scotland the exception only applies to a creditor in a heritable security, it ought to be limited in this country to a mortgagee of real estate. That seems to me to be quite an impossible construction. It does not shock me at all to find that there may be differences in the application of this Act to Scotland and to England. At all events, I think it is our duty, in administering the law in England and construing this Act, to give the term that which is its undisputed meaning in this Court. Then it is said, as a second point, that the expression "mortgagee in possession" ought to apply, not to a mortgagee who has taken possession as part of the original transaction long before the war began, but only to a case where possession has been obtained adversely. Why? I never heard of two classes of mortgagees in possession: one who takes possession adversely by giving a notice to the tenants or otherwise, in spite of anything the mortgagor can do, and the other a mortgagee who, as part of the original transaction, has entered into possession. I think that the judgment of Lord Coleridge J.

was quite right, and that this appeal fails and must be dismissed with costs.

PHILLIMORE L.J. I agree. The defendant company are seeking to realize a security, and the statute forbids them to realize a security except by way of sale by a mortgagee in possession, which is the way in which they propose to do it. The expressions "mortgagee" and "mortgagee in possession" are appropriate to such cases of personal property as debentures or shares, and it is admitted that prima facie this company are mortgagees in possession of these debentures. It is said that we must limit the term "mortgagee" to "mortgagee of real estate," because in the application of the Act to Scotland the substitute for "mortgagee" is "creditor in a heritable security," and that means a mortgagee of real estate. I imagine that it does, I do not say more, and I assume for the purposes of this case that it does. What is the result? There are three possible conclusions: it may be that the expression "realise a security" does not apply in Scotch law to a mortgagee in possession of shares. It may be so, and it may not. It may be that the Legislature, legislating, Mr. Compston says, in a hurry, has not gone far enough in the way of exception in Scotland, or it may be that it has gone too far in the way of exception in England, which one cannot tell; but here are plain words to be understood by an English Court, which apply to this case; and because it is possible, either that by reason of our ignorance of the law of Scotland we may not see the absence of necessity for such a limitation in Scotland, or because it is possible that the Legislature has either gone too far in one country, or not far enough, are we therefore to put a non-natural meaning on these words? I decline to do that.

Then it is said this only applies to a mortgagee who has taken possession adversely. The statute does not say a mortgagee who has taken possession, but says a mortgagee who is in possession, and I do not understand Mr. Compston's distinction. Every mortgagee takes possession to get into possession. Every mortgagee takes it by reason of some gift or grant of the mortgagor. It is part of the transaction of the mortgage which

C. A. 1915

ZIMAN v. KOMATA REEFS GOLD MINING COMPANY, LIMITED.

Phillimore L.J.

entitles him to do it, whether he does it ab initio or whether he does it later; in either case it is equally given to him and it is equally taken by him. Whether it is given or whether it is taken, or whether it is both, what the statute speaks of is a mortgagee de facto or de jure in possession, however it comes to be. He will have to account for the proceeds of the sale, but he is allowed to sell; therefore I agree that this appeal must be dismissed.

JOYCE J. I agree.

Appeal dismissed.

Solicitors: *Ballantyne, Clifford & Hett; Greenip, Snell & Co.*

H. C. R.

C. A. 1915 *Jan.* 12.

[IN THE COURT OF APPEAL.]

SHAW AND OTHERS, APPELLANTS *v.* MAYOR, &c., OF HALIFAX, RESPONDENTS.

Rates—Exemption—Charity—"Building exclusively used for the purposes of public charity"—Home for Ladies in Reduced Circumstances—Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *s.* 168.

By s. 168 of the Towns Improvement Clauses Act, 1847, "no person shall be rated to any rate made in pursuance of this or the special Act in respect of tithes, or of any church, chapel, meeting-house, or other building exclusively used for public worship, or any building exclusively used for the purposes of gratuitous education of the poor or of public charity, or any building or land belonging to the Commissioners."

Trustees under a will founded and endowed in 1875 out of moneys bequeathed by the testator for the purpose, augmented by smaller gifts and bequests from a few other persons, a perpetual charity. There were no public subscriptions. The primary objects of the charity were declared by the deed of foundation to be (1.) to provide a home for ladies by birth and education (called lady occupants) who had become reduced in circumstances; (2.) to pay annuities to lady occupants; and (3.) to pay annuities to ladies in reduced circumstances who were not lady occupants (called lady recipients). The annuities were not to exceed 52*l.* a year. The deed provided that the governors of the charity were to erect houses not exceeding twenty-four in number on land purchased by them for the charity; that they were from time to time to elect as lady occupants such persons, being not less than fifty years of

age and being either spinsters or widows, as they should consider most deserving of the charity; and that every candidate for election as a lady occupant must satisfy the governors that she was possessed in her own right of not less than 20*l.* a year. A preference in the election of lady occupants and lady recipients was to be given, all other circumstances being equal, to any candidate born in the parish of Halifax or resident therein for a period of five years in the aggregate. No candidate was to be ineligible on account of her religious opinion, and a lady occupant or lady recipient upon marrying was to cease to be entitled to any benefit under the charity. Every lady occupant was to be entitled to the exclusive use of one house free of rent, the governors to pay all rates and taxes and to keep the house in repair.

The home was erected within the borough of Halifax, and consisted of twelve houses, and each house was occupied by a lady occupant. The parish of Halifax covered an area of fifteen miles in length by fifteen miles in breadth, and had a population of about 205,000. The corporation of Halifax having rated the occupiers of the houses to the borough and general district rates:—

Held, that the charity by reason of its extensiveness was a "public charity"; that the houses were "buildings exclusively used for the purposes of public charity" within s. 168 of the Towns Improvement Clauses Act, 1847; and that the occupiers were exempt from rates in respect thereof.

APPEAL from an order of a Divisional Court (Lush, Rowlatt, and Atkin JJ.) upon a case stated for the opinion of the Court under s. 11 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45). The appellants gave notice of appeal to quarter sessions against a rate and assessment made by the respondents on April 1, 1914, and by consent and by order of the Court this case was stated.

The first seven appellants (1) (hereinafter called the John Abbott's trustees) were at all material times the trustees of an asylum for ladies called "The John Abbott's Trustees Ladies Home" (hereinafter called the home), which was at all material times vested in them. The home consisted of thirteen houses; and the remaining appellants were rated in the said rate as the respective occupiers of the houses. The John Abbott's trustees were entered in the said rate as the owners of houses.

The home was an institution founded in 1875 in order to

(1) The words appellants and respondents are used in this report with reference to the position of the parties on the appeal to quarter sessions.

C. A. 1915

SHAW v. HALIFAX CORPORATION.

carry out the directions contained in the will of the late John Abbott, of Halifax, who died on May 13, 1870, by the trustees of the will with the aid of moneys left to them by the said will amounting to 63,506*l.*, which had been augmented from time to time by other gifts and bequests from twelve persons varying in amount from 7392*l.* to 50*l.*, and amounting in all to the sum of 11,203*l.* Nine of the twelve donors were described as of Halifax, one as of Batley, one as of Sowerby Bridge, and one as of Harrogate.

The original deed of foundation was executed on September 30, 1875, but it had been superseded by a deed of foundation executed on July 1, 1886 (hereinafter called the deed of foundation). All the material provisions contained in the original deed of foundation as to the foundation and endowment of the home were repeated in the deed of foundation, and it was agreed by the parties to refer to the deed of foundation for all the provisions relating to the home.

By the deed of foundation the trustees of the will founded and endowed a perpetual charity for the establishment of an institution to be called "The John Abbott's Trustees Ladies Home" and a charity in connection therewith, and the primary objects of the charity were declared by clause 2 of the deed of foundation to be as follows :—

"(1st.) To provide a home for ladies by birth and education, who have become reduced in circumstances, and for such ladies who by their pecuniary needs may be deserving a better or more comfortable position in life.

"(2ndly.) To pay annuities to such ladies as aforesaid hereafter referred to as lady occupants.

"(3rdly.) To pay annuities to such ladies not being lady occupants, such non-resident ladies being hereinafter referred to as lady recipients."

By clause 3 the trustees or their successors (who were described in the deed as the governors) were to expend part of the capital of the trust funds in erecting upon land purchased by them for the purpose of the charity houses with offices and outbuildings in such manner as they might from time to time determine, not exceeding twenty-four in number.

By clause 4 the governors were from time to time to expend the income of the charity or any part thereof (1.) in improving the houses and buildings, gardens and premises, and in keeping the same in proper order and repair, and in payment of all rates, taxes, fire insurance premiums, water rates or charges for water, but not charges for gas, in respect of the said premises; (2.) in paying to every lady occupant and lady recipient an annuity of such an amount, not exceeding 52*l.*, as the governors might from time to time determine.

By clause 6 the number of lady occupants was to be the same as the number of houses.

By clause 8, "the governors shall from time to time elect as lady occupants such persons being not less than fifty years of age, and being either spinsters or widows, as they the governors shall consider most deserving of the charity. But every candidate for election as a lady occupant or as a lady recipient must satisfy the governors with . . . . testimony in writing of three householders as to her character, respectability, and pecuniary circumstances. And every candidate for election as a lady occupant must also satisfy the governors with evidence that she is possessed in her own right of an income not less than 20*l.* per annum."

By clause 9, "A preference in every election, whether of a lady occupant or of a lady recipient, shall be given, all other circumstances being equal, to any candidate who can produce such evidence as the governors may be satisfied with that she was born in the parish of Halifax, or that she has resided within the said parish for a period of five years in the aggregate."

By clause 10, "no candidate shall be ineligible, or be considered a less deserving object of the charity, by reason or on account of her religious profession or opinion."

By clause 11, "any lady occupant or lady recipient contracting marriage shall thenceforth cease to be entitled to any benefit under the charity."

By clause 16, "Every lady occupant shall be entitled to the exclusive use of one house, with its appurtenances, and she shall not be charged anything by way of rent, or for water, or for the expenses of keeping the house in repair; and all rates and taxes shall be paid out of the income of the charity; but every lady

C. A. 1915

SHAW v. HALIFAX CORPORATION.

occupant shall pay for the gas and coals used by her, and for medical attendance."

By clause 43, "No person shall be entitled as a matter of right to any of the benefits of the charity; and lady occupants shall be entitled to stay in the home, and lady occupants and lady recipients shall be entitled to receive their annuities only during the pleasure of the governors. . . . ."

The capital and income of the charity were applied in accordance with the provisions of the deed of foundation. The home was erected in pursuance of the first of the primary objects of the charity as stated in clause 2 of the deed, and was erected and maintained out of the capital and income of the charity. There were not and never had been any subscriptions to the charity either of a public or private nature other than the gifts and bequests hereinbefore referred to.

The home was situated adjoining Skircoat Green Road, in the borough of Halifax, and consisted of the aforesaid thirteen houses, namely, a lodge and twelve other houses which were built round a drive, by which the lodge and each of the twelve other houses were approached. The drive was roughly elliptical in shape, and the space enclosed by it was used as a field, park, or lawn: the said space was planted with trees in the centre and was railed off from the drive by iron railings; it was grazed by sheep, for which grazing the sum of 2*l.* per annum was paid to the John Abbott's trustees. All the houses faced towards and overlooked the space. The area occupied by the home was surrounded by a wall, and was entered by a gateway for carriages near which the lodge was situated. With the exception of the space surrounded by the drive no part of the area occupied by the home was fenced off from any other part. The parts of the area nearest to the surrounding wall on all sides were laid out as gardens or pleasure grounds, and garden seats were provided in several places. There were a greenhouse and a potting-shed and toolhouse, which were used for purposes connected with the gardens.

In each of the twelve houses a lady occupant resided under the conditions laid down in the deed of foundation. All the lady occupants possessed the qualifications required by the

deed of foundation. A small portion of the furniture of each house was the property of the John Abbott's trustees; the rest of the furniture of each house was the property of the lady occupant of the house. All internal and external painting and repairing was done by and at the expense of the said trustees. All the lady occupants had unrestricted access to all parts of the gardens or pleasure grounds, but not to the centre field or park above referred to. Fred Holroyd, a gardener employed by the trustees, attended to the gardens and pleasure grounds and resided rent free in the lodge. A part of the lodge was used as a board-room for the meetings of the trustees.

The ancient parish of Halifax (in which all lady occupants had been born or had resided before election for at least five years) extended from the city of Bradford to the boundary of the county of York, was about fifteen miles in breadth by fifteen miles in length, comprised the boroughs of Halifax and Brighouse, seventeen urban districts and two rural districts, and contained a population of about 205,000.

The respondents on April 1, 1914, made a borough rate and general district rate for the year ending March 31, 1915, and in the said rate each of the thirteen houses was entered as of the gross estimated rental of 13*l.* and of the rateable value of 11*l.* The lady occupants and the gardener were rated in the said rate as the respective occupiers of the houses, the John Abbott's trustees being entered as the owners.

The John Abbott's trustees had been rated to and paid similar rates and assessments since 1884; but in 1895 they paid under protest, and on several occasions they had claimed to be exempt on the ground hereafter stated.

The appellants contended "that the said thirteen houses are and that each of the said thirteen houses is a building exclusively used for the purposes of public charity within the meaning of s. 168 of the Towns Improvement Clauses Act, 1847 (1), and that

(1) 10 & 11 Vict. c. 34, s. 168: "Provided also, that no person shall be rated to any rate made in pursuance of this or the special Act in respect of tithes, or of any church, chapel, meeting-house, or other building exclusively used for public worship, or any building exclusively used for the purposes of gratuitous education of the poor or of public charity, or any building or land belonging to the Commissioners."

C. A. 1915

SHAW v. HALIFAX CORPORATION.

they are not liable to be rated to the said rate and assessment in respect of the said houses or of any of them."

The respondents contended "that the said John Abbott's Trustees Ladies' Home is a private and local charity and that none of the said thirteen houses is a building exclusively used for the purposes of public charity within the meaning of s. 168 of the Towns Improvement Clauses Act, 1847, and that therefore the appellants are respectively liable to be rated to the said rate and assessment in respect of each of the said thirteen houses."

The question for the opinion of the Court was whether the contention of the appellants was correct.

If the Court answered the question in the affirmative, the said entries were to be struck out of the rate and assessment, and the appeal was to be allowed with costs; if the Court answered the question in the negative, the said rate and assessment were to stand and the appeal was to be dismissed with costs; or the Court should make such further or other order as to the Court should seem fit.

The Divisional Court held that, looking at the extensiveness of the class to be benefited by the charity, the buildings were exclusively used for the purposes of public charity within the meaning of s. 168 of the Towns Improvement Clauses Act, 1847, and that therefore the appellants were not liable to be rated in respect thereof.

The respondents, the corporation, appealed.

Tindal Atkinson, K.C., and *Courthope-Munroe*, K.C., for the corporation. These houses are not "exclusively used for the purposes of public charity" within the meaning of s. 168 of the

---

Sect. 3 of the Halifax Park and Improvement Act, 1858 (21 & 22 Vict. c. xci.), incorporates, among othe sections, s. 168 of the Towns Improvement Clauses Act, 1847, which comes under the heading "With respect to the manner of making rates authorized by this or the special Act," save in so far as the same are expressly varied or excepted; and by s. 4 the clauses of the Towns Improvement Clauses Act, 1847, "apply to all rates of whatever kind, and for whatever purpose, and under whatever authority, and whether under this Act or under any other Act or Acts, general or local, from time to time after the commencement of this Act made by the corporation and the local board respectively."

Towns Improvement Clauses Act, 1847. In *Hall* v. *Derby Sanitary Authority* (1), under words in a local Act similar to those in s. 168 of the Act of 1847, the Divisional Court (Manisty and A. L. Smith JJ.), in coming to the conclusion that the charity there—a railway servants' orphanage—was a "public charity," laid stress upon the fact that the charity was maintained by public subscriptions and was for public purposes. No doubt Manisty J. (at p. 171) doubted whether the test of a public charity was the source from which the income was derived, but he said that it was not necessary to consider it because the income, with a small exception, was derived from the voluntary donations of the public. A. L. Smith J. (at p. 173) said that "this is a charity subscribed by the public for public purposes." Therefore the source of the funds and their application are the material matters to consider, and are tests as to whether a charity is or is not a public charity. To make it a public charity the funds to found and support it must come from a public source. The object with which s. 168 of the Act of 1847 was enacted must be considered in construing it. The object of the exception is to relieve a charity, which is supported by the public for the public in the locality, from paying rates. It was never intended that the ratepayers should subsidize a charity founded by a private person and not supported out of public funds or by public subscriptions. "Public charity" means a charity kept up by the public for the public. In *Attorney-General* v. *Pearce* (2) Lord Hardwicke L.C. was construing the words "charities of a publick nature" and "publick charities" in a will, and he said that the extensiveness of the charity made it a public charity. The Lord Chancellor had to consider the intention of the testatrix in using the words, and his language cannot be applied to the construction of a statute, which must be construed with reference to the object with which it was passed. In *Reg.* v. *Inhabitants of Stapleton* (3) Blackburn J., in delivering the judgment of the Court of Queen's Bench, said that "it cannot be said that the purpose for which these premises are occupied

(1) (1885) 16 Q. B. D. 163. (2) (1740) 2 Atk. 87.
(3) (1863) 4 B. & S. 629, at p. 639.

C. A. 1915

SHAW v. HALIFAX CORPORATION.

is public in any sense of the word. They are occupied for the purposes of a highly laudable charity, but one of a strictly private nature." The question in that case was not the same as the question in the present case, but that expression of opinion assists the contention put forward by the corporation. The question there was whether or not there was beneficial occupation of the premises. So in the present case each of the lady occupants was in beneficial occupation of the house in which she resided. The trustees only provided the house, and, though this is not stated in the case, each of the ladies had to bring her own furniture in order to make the house habitable. There is a beneficial occupation of the houses by the ladies beyond their occupation as objects of the charity, and therefore it cannot be said that the houses are "exclusively" used for the purposes of public charity. The exemption must be construed strictly. The funds of the charity here came from a private source, and the class to be benefited by the charity is too limited. It is a private and not a public charity. [*Rex* v. *St. Luke's Hospital* (1) and *Royal Masonic Institution for Boys* v. *Parkes* (2) were also referred to.]

Colam, *K.C.*, and *Konstam*, contra, were not called upon.

BUCKLEY L.J. By s. 168 of the Towns Improvement Clauses Act, 1847, "no person shall be rated to any rate . . . . in respect of . . . . any building exclusively used for the purposes . . . . of public charity." The sole question is whether certain houses described in the special case, thirteen in number, are or are not buildings exclusively used for the purposes of public charity. The thirteen houses constitute an institution founded in 1875 to carry out certain directions contained in the will of a Mr. John Abbott, of Halifax. He left for that purpose a sum of about 63,000*l.* In addition twelve other persons, mostly resident in Halifax, gave sums varying in amount from 7392*l.* to 50*l.* From the benefactions of Mr. Abbott, supplemented by the gifts of these other persons, the houses were erected. The institution is governed by a deed of foundation, and to ascertain what the institution is it is necessary to refer to a few of the provisions of the deed.

(1) (1760) 2 Burr. 1053. (2) [1912] 3 K. B. 212.

The primary objects of the charity are described in clause 2. They are: first, to provide a home for ladies by birth and education, who have become reduced in circumstances, and for such ladies who by their pecuniary needs may be deserving a better or more comfortable position in life; secondly, to pay annuities to ladies, described as lady occupants, who reside in the houses; and thirdly, to pay annuities to ladies not being lady occupants, who are called lady recipients. The selection of these ladies is provided for by clause 8, which says that "the governors shall from time to time elect as lady occupants such persons being not less than fifty years of age, and being either spinsters or widows, as they the governors shall consider most deserving of the charity. But every candidate for election as a lady occupant or as a lady recipient must satisfy the governors" of certain particulars, one being, in the case of a candidate for election as a lady occupant, that she is possessed in her own right of an income of not less than 20*l.* a year. By clause 10, "no candidate shall be ineligible or be considered a less deserving object of the charity by reason or on account of her religious profession or opinion." By clause 11, "any lady occupant or lady recipient contracting marriage shall thenceforth cease to be entitled to any benefit under the charity." I have read sufficient to show what the class of lady occupants is. It is a class of ladies by birth and education, who are in reduced circumstances but have certain limited means of their own, who must be either spinsters or widows, who may be of any religious profession or opinion, and who, if they marry, lose the benefit of the institution. That is a very large class, and the largeness of that class is not cut down by the fact that clause 9 provides that "a preference in every election . . . . shall be given, all other circumstances being equal, to any candidate who can produce such evidence as the governors may be satisfied with that she was born in the parish of Halifax, or that she has resided within the said parish for a period of five years in the aggregate." The class is a large class, a preference in the election to be given to persons born or resident within a certain district. That preference, as I have said, does not cut down the largeness of the class; it merely regulates the selection from the members of the class.

C. A.
1915
SHAW
v.
HALIFAX
CORPORATION.
Buckley L.J.

Twelve of the thirteen houses are occupied by lady occupants elected under the deed. The question is whether those twelve houses—I omit the house occupied by the gardener, with which I shall deal presently—are exclusively used for the purposes of public charity. It is said that to answer this question the Court must look at the source from which the funds of the charity come. Do they come from the public, or do they come from a sole donor or a limited number of donors? That is the contention. I do not say that in all circumstances the question whether the funds were derived from public subscription would be immaterial, but I do say that the fact that they are not derived from public subscription by no means shows that the purpose to which they are to be applied is not that of public charity. A sole testator may devote funds to a public charity. On the other hand, public subscribers may devote funds to that which is not a public charity. Take this illustration. A distinguished public servant, who has rendered great service to the nation, is left, or he leaves a widow, insufficiently provided for. By means of a Mansion House fund a substantial sum of money is raised to provide him or his widow with an annuity. The charity is to a private person, to a sole recipient, but the source of subscription is public, as it is a Mansion House fund. Is that a "public charity"? Certainly not. The publicity of the subscription does not make the charity public, neither to my mind does the absence of public subscription make it private. It may be that in some circumstances the fact that the public have been invited to subscribe may be some guide in leading to a conclusion, but that it is a conclusive guide or a test in itself is, to my mind, manifestly unsound. This was the opinion of Manisty J. in *Hall* v. *Derby Sanitary Authority*. (1) Public subscription is not a test; it can be but one factor in guiding to a conclusion.

What then is the test? The test, according to Lord Hardwicke in *Attorney-General* v. *Pearce* (2), may be expressed in these words: "It is the extensiveness which will constitute it a publick one." That was the view taken by both the learned judges in *Hall* v. *Derby Sanitary Authority*. (3) To ascertain whether a

(1) 16 Q. B. D. 163, at p. 171.
(2) 2 Atk. 87.
(3) 16 Q. B. D. 163.

charity is public or not I apprehend that the tribunal has to see whether the persons who will benefit by the charity are selected from the public, but not necessarily from all the public. There are very few charities—I cannot for the moment think of one —which extend to all the public. There are always qualifications and restrictions. It may be poverty, it may be residence in a particular locality; there may be other restrictions. The class which is to benefit may be limited in some way; but any member of the public who falls within the class must be a proper recipient of the charity. Without attempting to draw a line, it seems to me that the salient point to be considered in ascertaining whether a charity is public or private is to see whether the class is one which extends to a substantial body of the public. Here I wish to guard myself. In the present case I have not to see merely whether this is a public charity. That is not what the section says. I have to see whether these buildings are exclusively used for the purposes of public charity. In my opinion they are. They are exclusively used for the housing and comfortable occupation of ladies in reduced circumstances. That is a charity to those persons. It is said—though I confess I have been unable to follow the argument—that the fact that the lady occupants usually bring some furniture with them in some way affects the question. I do not see how that is material. Each lady is provided by this public charity with a house for herself and her furniture, if she brings her furniture with her. In my opinion the building is exclusively used for the purposes of public charity, namely, for the purposes of housing the lady and that which must necessarily accompany her for the purposes of her occupation, her clothing and her furniture, and it may be her pet dog.

There remain two points which should be noticed. The first is not raised in the case; the other is. The first is this. These thirteen houses are erected round a central lawn or park, fenced off from the drive. That lawn or park is a convenience for the houses, but it forms a separate tenement. It may form the subject of a separate occupation. There may be a question whether it is occupied by the trustees or by the lady occupants, and whether, if it be occupied by one or other of them, it is exclusively used

C. A. 1915

SHAW v. HALIFAX CORPORATION.

Buckley L.J.

for the purposes of public charity. That question is not raised on the special case. It was excluded in the Court below, and I am not determining anything as regards that piece of land.

The other point is this. The thirteenth house is not occupied by a lady occupant. It is occupied by the gardener. He lives there rent free. As regards that house there may be a question—I do not say there is—whether the occupation by him as gardener for the charity is an occupation exclusively for the purposes of public charity. It is not separately raised upon the special case. I do not mean to preclude any question being raised as to whether or not that house is occupied by the trustees; and whether, if it is occupied by the trustees, it is occupied exclusively for the purposes of the charity. Neither of the two points which I have excepted is covered by the order appealed against.

I think that the decision of the Divisional Court is right, and that the appeal should be dismissed.

KENNEDY L.J. I am of the same opinion. We have to decide, on the facts stated in the case, whether these houses are exclusively used for the purposes of public charity within the meaning of s. 168 of the Towns Improvement Clauses Act, 1847. I agree with what Buckley L.J. has said, that in affirming the judgment appealed against we do not intend to preclude the question of the gardener's house being subsequently raised, and there may also be a question as to the user of the square or inclosure which is apparently let at a profit rent.

Dealing with the houses which are occupied by the ladies, I am of opinion that we ought to hold, as the Divisional Court have held, that the houses are exclusively used for the purposes of public charity. It is no doubt unsatisfactory when one has to come to a conclusion for which no exact test can be laid down. When the question is proposed as to whether or not a particular charity is or is not a public charity, I confess that I feel myself unable to state a definite test, or to supply a universal definition, of what is or of what is not a public charity. I feel with A. L. Smith J. in *Hall* v. *Derby Sanitary Authority* (1) when he said: "We are not laying down any general definition of a public

(1) 16 Q. B. D. at p. 173.

charity, which may be hard or impossible to do." For myself I find it at present impossible. Whatever the definition should be or wherever the exact line should be drawn, we have to come to a conclusion on which side of the line the particular case falls. It is true that we have to deal with the words "building exclusively used for the purposes of public charity," not simply with what is a public charity. But I do not think that any argument can be based upon that. In *Hall* v. *Derby Sanitary Authority* (1) exactly the same observation might have been made, because there the words to be construed were identical with the present words, except that the words "and occupied" were added to the word "used." The words there were "used and occupied exclusively for the purposes of public charity."

To my mind it is impossible to say that the test of what is a public charity can be found in the source of the income of the charity. So far, with great respect, I should venture to differ from one part of the reasoning of A. L. Smith J. in *Hall* v. *Derby Sanitary Authority*. (1) I cannot think that the test of publicity lies in the fact that the subscriptions come from the public. No doubt, as regards many institutions, such as the railway orphanage in *Hall's Case* (1), subscriptions from the public will accompany the publicity of a charity, inasmuch as the public are not likely to subscribe to a charity the benefits of which are to be applied to a private object. The public will, as a general rule, only subscribe to a charity the benefits of which are, to some extent at any rate, of a general and extensive character. So that if it is found that the public are subscribing to a charity one will expect to find that the charity is properly designated as "public." There may be cases in which the public will subscribe for a special private purpose, for the advantage of a particular individual, such as Buckley L.J. has mentioned; but, generally speaking, an institution will not be supported by public subscriptions which is not to some extent also of an extensive character. I do not think that the source of the fund is any real test in arriving at a conclusion as to the publicity of a charity. I think that one may look at that upon which Manisty J. in *Hall* v. *Derby Sanitary Authority* (2), on the authority of Lord Hardwicke in *Attorney-*

(1) 16 Q. B. D. 163. (2) 16 Q. B. D. at pp. 171, 172.

C. A.
1915

SHAW
v.
HALIFAX
CORPORATION.

Kennedy L.J.

General v. *Pearce* (1), expressly laid stress, namely, the extensiveness, I will not say the universality, of the nature of the charity. If a railway orphanage is of that character, as was held in *Hall* v. *Derby Sanitary Authority* (2), I think it is impossible to deny publicity to a charity which is given, as was pointed out by one of the learned judges in the Divisional Court, to a sadly large class of the whole community, with a preference indeed for those who were born or have resided for a certain time within a limited though still a large area, merely because the source of the income is a private donor or a number of private donors, and there is no subscription for the support of the institution coming from the public generally.

If I were asked whether the charity, established by this deed of foundation, was a public charity, I should say that it was. The exact question I have to answer is whether the buildings which are occupied by these ladies who benefit from this charity are exclusively used for the purposes of public charity. I answer that they are. These ladies are members of a class of an extensive character, and therefore the buildings are used, not for the purposes of private charity, but for the purposes of public charity, looking at the area over which the charity, by the terms of the deed of foundation, is to extend. I think that the appeal should be dismissed.

PICKFORD L.J. I am of the same opinion. Upon the main question, whether the houses occupied by these ladies are exclusively used for the purposes of public charity, I agree with the other members of the Court and do not think it is necessary to add anything. Nor do I think it necessary to add anything as to the land let for grazing, which is not really included in the special case, and was merely mentioned in the Divisional Court ex abundante cautela. But with regard to the house occupied by the gardener it seems to me that, upon this special case, that must follow the decision as regards the other houses. It may be that there are grounds upon which the rating of that house may be supported, apart from the point argued before us, and some such grounds have been suggested to us. Whether they were argued

(1) 2 Atk. 87. (2) 16 Q. B. D. 163.

in the Court below I do not know; the judgment does not mention them. The question asked us in the case is "whether the contention of the appellants is correct." The contention of the appellants was "that the said thirteen houses are and that each of the said thirteen houses is a building exclusively used for the purposes of public charity." If that stood by itself, possibly one would have to consider each one of the houses; but in answer to that contention "the respondents contend that the said John Abbott's Trustees Ladies' Homes is a private and local charity, and that none of the said thirteen houses is a building exclusively used for the purposes of public charity." That is the way in which the respondents met the appellants' argument, and that is the only point, it seems to me, open upon this special case. Therefore the question whether the rating of that particular house can be supported on other grounds does not seem to be before us now, and it is not necessary to say anything about it.

Appeal dismissed.

Solicitors for appellants: *Sewell, Edwards & Nevill, for Hill & Norris, Halifax.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for P. Saunders, Halifax.*

W. F. B.

C. A.
1915
Feb. 5, 8.

[IN THE COURT OF APPEAL.]

In re REYNOLDS.
Ex parte WHITE BROTHERS, LIMITED.

[No. 57 of 1914.]

Bankruptcy — Married Woman — Carrying on a Trade — Continuance of Trade—Debt contracted by her when single—Married Women's Property Act, 1882 (*45 & 46 Vict. c.* 75), *s.* 1, *sub-s.* 5—*Bankruptcy and Deeds of Arrangement Act*, 1913 (*3 & 4 Geo.* 5, *c.* 34), *s.* 12.

Sect. 12, sub-s. 1, of the Bankruptcy and Deeds of Arrangement Act, 1913, provides that "Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole."

F. J. S., a spinster, carried on business till June, 1914. After that date she ceased to trade actively, and on July 25 she married. After her marriage she continued to realize the assets of the business and get in debts due to it. On July 29 she committed an act of bankruptcy by stating at a meeting of her creditors that she could not pay her debts. A creditor, whose debt was contracted by her before marriage, having presented a bankruptcy petition against her:—

Held, that she must be taken to have carried on the business after her marriage, and was subject to the bankruptcy laws as if she were a feme sole within the meaning of s. 12, sub-s. 1, of the Bankruptcy and Deeds of Arrangement Act, 1913.

Appeal from a decision of a Divisional Court (Horridge and Rowlatt JJ.).

The facts were stated by Lord Cozens-Hardy M.R. substantially as follows:—

There was a corn merchant's business carried on by the debtor's father. He died in August, 1912, having by his will appointed his wife executrix and sole legatee. The widow did not prove the will, but died on November 3, 1912, intestate. From that time till June, 1914, the daughter, then a spinster, carried on the business. She took out letters of administration to her mother's estate on December 12, 1912, and on April 9, 1913, letters of administration (with the will annexed) to the estate of her father were also granted to her; but it is impossible seriously to contend that from December, 1912, to June, 1914,

she carried on the business as administratrix. She had no right to do that. She got into difficulties and began negotiations with a view to the sale of the business as a going concern. These fell through. She did not actively carry on the business after June 10, and she sold the whole of the stock and machinery by auction on July 1, 1914. From this sale were excepted the book debts and some hay which was on the premises of a railway company and subject to a lien for storage. On July 24 the debtor sent to the creditors of the business a circular giving them notice of a meeting of creditors to be held on July 29. On July 25 she was married. On the 29th the meeting of creditors was held. She was not present, but her solicitor made a statement on her behalf that she was unable to pay her debts, and this was undoubtedly an act of bankruptcy unless her position as a married woman took her out of the bankruptcy laws. She alleged that she gave up trading in June, 1914, but she instructed an agent to get in book debts due to the estate to the amount of 136*3l.*, and she sold the hay in November, 1914.

On October 27 creditors of the business whose debt was due before the marriage presented a bankruptcy petition against her founded on the act of bankruptcy committed at the meeting. At this date there were still some book debts outstanding. The registrar of the Birmingham County Court dismissed the petition on the ground that the debtor had ceased to carry on business on June 10 and, therefore, was not at the date of the hearing of the petition a married woman carrying on business. The petitioning creditors appealed to the Divisional Court, when the learned judges (Horridge J. and Rowlatt J.) differed and the appeal was dismissed.

The petitioning creditor appealed.

Arthur Ward, for the appellant. It will be said on behalf of the respondent that she ceased to trade on June 10. But on July 24 she had not paid her trade debts and she still had assets to realize.

On July 25 she married, her debts being still unpaid. She committed an act of bankruptcy at the meeting of creditors on July 29 and became amenable to the bankruptcy jurisdiction.

C. A. 1915

REYNOLDS, *In re.* WHITE BROTHERS, LIMITED, *Ex parte.*

On November 2 she sold the hay, and on November 12 the bankruptcy petition against her was dismissed on the ground that she was a married woman not carrying on business. The question is what was then her status. Was she a married woman carrying on a trade or business? It is said that she carried on business as a spinster, but never as a married woman, all the trade debts having been contracted before her marriage. But the real test is whether all her trade debts had been paid. So long as any were unpaid she continued to carry on business: *In re Clark* (1); *In re Dagnall.* (2) In *In re a Debtor* (3) the married woman was not carrying on a trade separately from her husband, and therefore was not subject to the bankruptcy laws.

Here the debtor was a married woman carrying on business, and she is liable to be made bankrupt under the Bankruptcy and Deeds of Arrangement Act, 1913, s. 12.

J. F. Eales, for the respondent. In all the authorities cited by the appellant the debtor had carried on business as a married woman.

[SWINFEN EADY L.J. It is well settled that the trading continues until all the debts are paid.]

Subject to this, that where the debtor has not in fact traded as a married woman she is not subject to the bankruptcy laws. It is submitted that the respondent incurred the debts as administratrix and would be entitled to indemnity out of the estate.

[LORD COZENS-HARDY M.R. referred to *Dowse* v. *Gorton* (4); *Abbott* v. *Parfitt* (5); *In re Evans.* (6)]

As to the book debts and hay they were disposed of by the respondent in her capacity of administratrix.

The test is—was the debtor at the date of the bankruptcy petition a married woman carrying on business? By the Married Women's Property Act, 1882, a married woman could not be made bankrupt unless she was trading separately from her husband. By s. 12 of the Bankruptcy and Deeds of Arrangement Act, 1913, it is no longer material whether the trade is carried on separately from the husband or not. But in

(1) [1914] 3 K. B. 1095.
(2) [1896] 2 Q. B. 407, 410.
(3) [1898] 2 Q. B. 576.
(4) [1891] A. C. 190.
(5) (1871) L. R. 6 Q. B. 346.
(6) (1887) 34 Ch. D. 597.

order to render the married woman liable to bankruptcy the debts in respect of which she is sued must have been contracted by her as a married woman: *Ex parte Jones, In re Grissell* (1); *In re Gardiner*, (2) Here all the liabilities were incurred while the debtor was a spinster.

Formerly if a feme sole, trader, committed an act of bankruptcy and afterwards married and lived with her husband she could not be made bankrupt: Cooke's Bankrupt Laws, 4th ed. (1799), pp. 23, 35; and that is still the rule except where it has not been expressly altered. Neither the Act of 1882 nor the Act of 1913 provides that a married woman can be made bankrupt in respect of debts contracted by her as a spinster. In *In re Gardiner* (2), *In re Dagnall* (3), and *In re Worsley* (4) the debts were contracted after marriage. It must be shown that the debtor has actually traded as a married woman. A constructive continuance of her former trade is not enough. The existence of debts is not enough to show continuance.

[SWINFEN EADY L.J. referred to *Rawlinson* v. *Pearson.* (5)]

The change of status prevents the application of the rule. The continuing debts were debts of the estate, not debts contracted by her as a married woman. There is no case which decides that a married woman who carries on a trade can be made bankrupt on a debt contracted by her when she was single.

No reply was called for.

LORD COZENS-HARDY M.R. stated the facts and continued: An act of bankruptcy was undoubtedly committed at the meeting of creditors, unless the debtor's position as a married woman protected her from that jurisdiction. She was a married woman, but she was still carrying on business. She sold the hay, and continued to get in book debts which, to the substantial amount of 1363*l.*, had been due to the estate. She did this through an agent, but it must be taken to have been her act. Under these circumstances the question arises whether she was carrying on the business, either separately from her husband or

(1) (1879) 12 Ch. D. 484.
(2) (1887) 20 Q. B. D. 249.
(3) [1896] 2 Q. B. 407.
(4) [1901] 1 Q. B. 309.
(5) (1821) 5 B. & Ald. 124.

C. A. 1915

REYNOLDS, *In re.* WHITE BROTHERS, LIMITED, *Ex parte.*

Lord Cozens-Hardy M.R.

not, for if she was she was "subject to the bankruptcy laws as if she were a feme sole" under s. 12 of the Bankruptcy and Deeds of Arrangement Act, 1913. Under these circumstances what have we to guide us? Two principles have been laid down—I might almost say for centuries, at any rate for many years—at a time when traders alone, and not ordinary members of the public, could be made bankrupt. It was held that for the purpose of the bankruptcy law a man did not cease to be a trader because he shut up his shop and went away; he continued to be a trader so long as any of the trade debts remained unpaid. It was further held, and even more clearly, that when a trader not merely omitted to pay his debts but got in the assets of the business he was still carrying it on. The case of *Rawlinson* v. *Pearson* (1) referred to by Swinfen Eady L.J. was a clear and direct authority on this point. In that case a pawnbroker had ceased to carry on business in the ordinary sense of the term, but he had realized unredeemed pledges, and it was held that he was subject to the bankruptcy laws. On both points the arguments of the respondent's counsel fail. It is clear that at the date of her marriage, and for that matter at the present time, her trade liabilities have not been discharged. It is also clear that after the date of her marriage she dealt with the assets of the business by collecting the debts. I am not suggesting that she put the money into her own pocket, but it is clear that she was still carrying on the business at the date of the petition. It is said that the question under the old law depended on her status as a married woman. That is true, but it is not so now. Her status as a married woman does not protect her now. On the contrary the Bankruptcy and Deeds of Arrangement Act, 1913, s. 12, sub-s. 1, treats her as a common law debtor, and by sub-s. 2 a judgment is available for bankruptcy proceedings against her. With great respect to the opinion of the learned judge in the Court below who did not take this view, I think that the judgment of Rowlatt J. was right and this appeal must be allowed.

SWINFEN EADY L.J. I am of the same opinion and I agree with the view expressed by Rowlatt J. I need not repeat the

(1) 5 B. & Ald. 124.

facts, as they have been stated by the Master of the Rolls. The debtor carried on the business actively from November 3, 1912, till June 10, 1914. As administratrix she had no power to do that; her duty was to realize the assets. She bought and sold in the ordinary way as a trader. She was personally liable to the full extent of all the debts she incurred and not merely up to the limit of the assets. Although as between herself and the persons interested in the estate she may have been entitled to indemnity out of the assets, to the persons with whom she was dealing in the business she was liable personally. It is quite clear she was trading and not merely winding up her father's estate as administratrix. Debts incurred during that period remained unpaid, and where a person is a trader and contracts debts the trading continues as long as the debts remain unpaid. A person cannot escape from liability already incurred as a trader by putting up his shutters and ceasing to trade. In *In re Dagnall* (1) Vaughan Williams J. said: "Whether a person is carrying on a trade or not is a question of fact;"—that is a question of trade—"and if it were not for the decision in *Ex parte McGeorge, In re Stevens* (2)"—which he explains—"I should have said without any hesitation that as long as a woman trading separately from her husband had not paid the trade debts which she had incurred, so long she was continuing to trade. It seems to me that trading is not completed until you have performed all the obligations that the fact of trading imposed upon you." So that, on the first point, the trading continued until the debts were paid.

On the second point it is clear that after the marriage she continued to trade. Her husband had nothing to do with it; but she sold the hay and got in the book debts to the amount of nearly 1363*l*. In *Rawlinson* v. *Pearson* (3) it was held that a pawnbroker who realized unredeemed pledges was continuing the trade. When a person continues to realize his stock and get in debts and still owes debts he is continuing the trade, and this lady was continuing to trade. Therefore she comes within the words of s. 12 of the Act of 1913; she is a "married woman who

(1) [1896] 2 Q. B. 407. (2) (1882) 20 Ch. D. 697.
(3) 5 B. & Ald. 124.

C. A.
1915

REYNOLDS, *In re.* WHITE BROTHERS, LIMITED, *Ex parte.*

carries on a trade or business." Under that section it does not matter whether she does so "separately from her husband or not." On the facts she was carrying on a trade separately from her husband and was "subject to the bankruptcy laws." The appeal must be allowed.

PHILLIMORE L.J. I am of the same opinion. It was held in *In re a Debtor* (1) by the Court of Appeal that a married woman who was not carrying on trade separately from her husband could not be made a bankrupt. The report of that case in 5 Manson, 122, shows that she was not before marriage a trader at all; she was said to be a "spinster of no occupation." The old common law remained as before. But there has been no decision on the point whether a debt contracted in the course of trading by a single woman is or is not a debt on which she can be sued or made bankrupt under the Married Women's Property Act, 1882, or the Bankruptcy and Deeds of Arrangement Act, 1913, after her marriage. We have to construe s. 12, sub-s. 1, of the last-mentioned Act, which says "Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole." Therefore the only question that arises is whether this lady carried on trade as a married woman. There have been a series of decisions on the question whether a person who carried on a trade could be said to have ceased to be a trader. Those decisions, as has been pointed out, show that this is a case in which the trading had not ceased, because book debts were collected and debts paid after the marriage. That seems to me to decide this case. A married woman remains a trader after her marriage if the ordinary rule applies. It is suggested that she never was a trader because she was her father's administratrix and only acted on behalf of his estate. But she contracted trade debts in her personal capacity. *Abbott* v. *Parfitt* (2) was referred to, but that decision only shows that under the particular circumstances of that case executors could sue for goods supplied either as executors or in their personal capacity. It does not show that they were not personally liable.

(1) [1898] 2 Q. B. 576. (2) L. R. 6 Q. B. 346.

That contention also fails. I have read the judgment of Horridge J. in the present case and I do not agree with it. I prefer the decision of Rowlatt J. The appeal must be allowed and the orders made by the registrar and the Divisional Court discharged.

C. A. 1915

REYNOLDS, *In re.* WHITE BROTHERS, LIMITED, *Ex parte.*

Appeal allowed.

Solicitors: *Surr, Gribble & Co., for Docker, Hosgood & Son, Birmingham; H. G. Kenyon, for G. Pearsall Locker, Birmingham.*

H. C. R.

LONDON COUNTY COUNCIL *v.* PERRY.

1914 *Dec.* 8. 1915 *March* 4.

Revenue — Licence — "Male Servant" — Driver of Motor Car — Employment solely in Trade or Business — Revenue Act, 1869 (32 & 33 *Vict. c.* 14), *ss.* 18, 19 — *Customs and Inland Revenue Act*, 1876 (39 & 40 *Vict. c.* 16), *s.* 5 — *Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 13.

A "male servant," within the meaning of s. 19, sub-s. 3, of the Revenue Act, 1869, in respect of whom the tax must be paid, is a servant who is employed in one of the capacities enumerated therein, and as a personal, domestic, or menial servant, whether he is so employed for the purposes of a trade or business or not.

A man who is employed in one of the enumerated capacities, but not in a personal, domestic, or menial capacity, is not such a "male servant."

The same test is to be applied in the case of a man who is employed to drive a "motor car," within the meaning of ss. 13 and 20 of the Motor Car Act, 1903.

Whiteley v. *Burns* [1908] 1 K. B. 705, *Marchant* v. *London County Council* [1910] 2 K. B. 379, *London County Council* v. *Allen* [1913] 1 K. B. 9, and *Wolfenden* v. *Mason* (1913) 110 L. T. 31 considered.

CASE stated by a metropolitan police magistrate.

The appellants, who had the duty of collecting local taxation licences in London which are payable under the Revenue Act, 1869, prosecuted the respondent, Perry, for having unlawfully employed a male servant without having a proper licence as

1914

LONDON COUNTY COUNCIL v. PERRY.

required by the Revenue Act, 1869 (1), and the Motor Car Act, 1903 (2), namely, the driver of a motor car.

On October 27, 1913, a motor car was being driven by a man servant wearing a uniform coat and cap. The car belonged to a firm of upholsterers of which the respondent was a member, and had been purchased by the respondent on behalf of the firm in October, 1913. The car was, when first purchased, fitted with seats for six persons. On the respondent's instructions four of these seats were removed, leaving only the driver's seat and one beside him. A back entrance was also removed and the part of the body of the car behind the front seat was altered, a lid being fitted so as to provide a covered space in which the

(1) The Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 18: "There shall be granted, charged, levied, and paid, for the use of Her Majesty, her heirs and successors, in and throughout Great Britain, under and subject to the provisions and regulations in this Act contained, the following duties, that is to say:

"For every male servant 15*s*.

. . . . .

"And such duties respectively shall be paid annually upon licences to be taken out under the provisions of this Act by the person who shall employ the servant . . . ."

Sect. 19: "The provisions and regulations contained in this section shall be observed, viz.: . . . ."

"(3.) The term 'male servant' means and includes any male servant employed either wholly or partially in any of the following capacities; that is to say, maître d'hôtel, house steward, master of the horse, groom of the chambers, valet de chambre, butler, under butler, clerk of the kitchen, confectioner, cook, house porter, footman, page, waiter, coachman, groom, postilion, stable boy or helper in the stables, gardener, under gardener, park keeper, gamekeeper, under gamekeeper, huntsman, and whipper-in, or in any capacity involving the duties of any of the above descriptions of servants, by whatever style the person acting in such capacity may be called."

The Customs and Inland Revenue Act, 1876 (39 & 40 Vict. c. 16), s. 5: "The term 'male servant' as used in the Act 32 & 33 Vict., cap. 14, shall not include a servant who, being bonâ fide employed in any capacity other than the capacities specified or referred to in provision numbered three of s. 19 of the said Act, is occasionally or partially employed in any of the said capacities so specified or referred to, and shall not include a person who has been bonâ fide engaged to serve his employer for a portion only of each day and does not reside in his employer's house."

(2) The Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 13: "The definition of 'male servant' in sub-s. 3 of s. 19 of the Revenue Act, 1869, as amended by s. 5 of the Customs and Inland Revenue Act, 1876, shall be construed as if a person employed to drive a motor car were included in that definition.

upholsterer's samples could be carried. But no name or place of abode or business was painted on the car, as provided in the exemption contained in s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888. The car was acquired and used by the firm and the respondent solely for the purpose of calling on customers with samples in the way of trade.

There was also, at the instance of the appellants, an information against the respondent for keeping a carriage without a proper licence under the Revenue Act, 1869, and the Customs and Inland Revenue Act, 1888, s. 4, sub-s. 3. This summons was in respect of the same motor car. The magistrate was of opinion that the said motor car was a carriage within the meaning of the last-mentioned statutes for which the respondent was liable to pay duty and that it did not come within the limited exemption in favour of trade vehicles mentioned in the Customs and Inland Revenue Act, 1888, s. 4, sub-s. 3; and he accordingly convicted the respondent of that offence.

The driver of the motor car was in the exclusive service of the firm. The respondent had engaged him on behalf of the firm at a weekly wage to drive the car and to teach the respondent himself to drive. Whilst on business journeys the driver gave instructions in driving to the respondent from time to time, but the car was not taken out or used for other than business purposes. The car was driven by the said driver except occasionally when the respondent took the wheel. The respondent was not always in the car when it was taken out.

It was contended upon the above facts that, by reason of the Motor Car Act, 1903, the said driver was a person employed to drive a motor car and was therefore a "male servant" within the meaning of that term in s. 19, sub-s. 3, of the Revenue Act, 1869; that it was immaterial under that statute that he was employed by the respondent for the purpose of driving the motor car in the course of the respondent's trade or business; that the male servants in respect of whom the licences were by the Revenue Act, 1869, necessary to be taken out by their employers were not only male servants employed in domestic service or in connection with an establishment of a domestic character, but that if such male servants were within the meaning of "male

1914

LONDON COUNTY COUNCIL v. PERRY.

servant" in s. 19, sub-s. 3, the said duty was payable; and the following cases were referred to: *Whiteley* v. *Burns* (1); *Marchant* v. *London County Council* (2); *London County Council* v. *Allen* (3); *Wolfenden* v. *Mason*. (4)

It was contended for the respondent that the driver was employed solely for the purposes of trade and not in any sense in a domestic capacity, and that the fact that incidentally whilst the car was being used for trade purposes he taught the respondent to drive was immaterial; and that the respondent was not liable to take out a male servant's licence in respect of the driver.

The magistrate was of opinion that the term "person employed to drive a motor car" in s. 13 of the Motor Car Act, 1903, was to be construed in the same way and with the same limitations as the words defining male servant in the Revenue Act, 1869, s. 19, sub-s. 3, and therefore meant a person employed to drive a motor car for domestic purposes, and, upon the facts, that the said driver was not employed for domestic purposes or for purposes of pleasure, but for purposes of trade only; and that, if the instruction in driving given by the driver to the respondent did constitute employment to drive a motor car within the Motor Car Act, 1903, s. 13, such employment was an occasional and partial employment only, within the meaning of s. 5 of the Customs and Inland Revenue Act, 1876, and incidental to his main employment as the driver of a carriage used for trade purposes. The magistrate therefore adopted the contention of the respondent, and in view of the decisions in *London County Council* v. *Allen* (3) and *Wolfenden* v. *Mason* (4) held that the driver was not a "male servant" within the Revenue Act, 1869, s. 19, sub-s. 3, as extended by the Motor Car Act, 1903, s. 13, and that he was not taxable, and accordingly dismissed the information.

The question for the opinion of the Court was whether that decision was correct in point of law.

Bodkin, for the appellants. The Revenue Act, 1869, by s. 18, imposes a tax in respect of "every male servant," which is to be paid upon a licence; and s. 19, sub-s. 3, defines "male servant."

(1) [1908] 1 K. B. 705.
(2) [1910] 2 K. B. 379.
(3) [1913] 1 K. B. 9.
(4) 110 L. T. 31.

Certain exemptions are expressly provided for by sub-ss. 1, 2, and 5 of s. 19; s. 4 of the Customs and Inland Revenue Act, 1873 (36 & 37 Vict. c. 18), provides a further exemption in the case of hotel and refreshment-house keepers in respect of any servant wholly employed for the purposes of the business; and s. 5 of the Customs and Inland Revenue Act, 1876, restricts the meaning of "male servant" so as not to include a servant who is only occasionally or partially employed in any of the capacities specified in s. 19 of the Act of 1869. Neither in the Act of 1869 nor in the subsequent Acts is there any general exemption in respect of servants employed in a trade or business. Any male servant employed in any of the capacities specified in s. 19 is a taxable servant unless he comes within one of the express statutory exemptions.

The Motor Car Act, 1903, s. 13, enacts that the definition of "male servant" in s. 19 of the Act of 1869, as subsequently amended, shall be construed "as if a person employed to drive a motor-car were included in that definition." That is a plain and clear enactment that the driver of a motor car shall be a "male servant" within the Act of 1869, and it is also clear that he does not come within any of the specified exemptions. Apart, therefore, from the decided cases which have introduced limitations upon the plain words of the statutes, this driver is a "male servant" taxable under s. 19. The earliest statute imposed a tax in respect of male servants generally, with certain specified exemptions: 17 Geo. 3, c. 39; and later statutes extended the scope of this taxation: 25 Geo. 3, c. 43; 38 Geo. 3, c. 41; 43 Geo. 3, c. 161; 16 & 17 Vict. c. 90. The last Act was repealed by the Act of 1869, and since that Act there can be no exemptions except those which are specifically given.

In *Spencer* v. *Sheerman* (1) it was decided that waiters in an hotel, though clearly employed in the business, were taxable "male servants," and in consequence of that decision the law was altered by the Act of 1873. The point as to employment for purposes of trade was first raised in *Whiteley* v. *Burns* (2), where it was held that waiters employed for purposes of trade, though employed in a capacity enumerated in s. 19, were not

(1) (1871) 23 L. T. 873.

(2) [1908] 1 K. B. 705.

1914

LONDON COUNTY COUNCIL v. PERRY.

"male servants" within the Act; but in *Marchant* v. *London County Council* (1) it was held that the house porter of a block of flats was a "male servant," though employed for the purposes of a business, and it was said that there was no general exemption in respect of a male servant employed for the purposes of a trade or business; and the case of *Whiteley* v. *Burns* (2) was explained on the ground that there the servants in question were not "waiters." In *London County Council* v. *Allen* (3) it was again said that there is no general exemption in respect of servants employed for purposes of trade or business, but it was held that the driver of the vehicle there in question was not a "coachman" within s. 19. That case really turned upon the question whether the driver was in fact a "coachman." In *Wolfenden* v. *Mason* (4) the judges differed, but Ridley J., who dissented, held that there was no exemption except those specified in the statutes.

Harold Murphy, for the respondent. A person is not a "male servant," within s. 19, if he is employed for purposes of trade or business. A person must be employed for purposes of pleasure or domestic purposes to be a taxable male servant. That is established by the authorities cited and by other cases. In *Nicoll* v. *Greaves* (5) Erle C.J. said: "The Legislature, in the Assessed Tax Acts which have been cited, seem to have drawn the line between persons employed in a service of luxury, in respect of whom the master is taxable, and those of necessity, such as servants in trade or husbandry, in respect of whom he is not taxable." The Motor Car Act, 1903, s. 13, and s. 19 of the Act of 1869 must be read together, and the driver of a motor is a "male servant" only if he is a "male servant" within the meaning of s. 19. To come within s. 19 a servant must be a menial servant, and the driver of a trade vehicle is not a menial servant: *Pearce* v. *Lansdowne*. (6) The decisions in *London County Council* v. *Allen* (3) and *Wolfenden* v. *Mason* (4) govern this case, and those cases were correctly decided.

Bodkin replied.

Cur. adv. vult.

(1) [1910] 2 K. B. 379.
(2) [1908] 1 K. B. 705.
(3) [1913] 1 K. B. 9.
(4) 110 L. T. 31.
(5) (1864) 17 C. B. (N.S.) 27.
(6) (1893) 62 L. J. (Q.B.) 441.

1915. March 4. The following judgments were delivered (1):—

1915

LONDON COUNTY COUNCIL v. PERRY.

DARLING J. This case was argued before five judges, and, as we are not agreed about it, there will be five separate judgments read. Before I read my own I would like to say that I think it is little creditable to the Legislature of this country that a taxing statute, a statute which every taxpayer and every person who can read ought to be able to understand and not to have grave doubt about, should be in such a state, owing to legislation by reference and ambiguity in wording, that five judges, who are also taxpayers, be it noticed, cannot come to any conclusion about it. Now I will read my own judgment.

Duty in respect of keeping male servants was, it would appear, first imposed by 17 Geo. 3, c. 39, and a licence for the keeping of them was required; but from that time onwards there have, by statute, been given and preserved certain exemptions in regard to male servants employed for purposes of trade. The statute now in force relating to this matter is the Revenue Act of 1869, extended to the servant now in question by the Motor Car Act, 1903.

It will be necessary now to read certain paragraphs of the special case by which this matter comes before us. [His Lordship read part of the case.]

There can be no doubt that the male servant here is "a person employed to drive a motor car," and he might well come within the meaning of s. 19, sub-s. 3, of the Revenue Act of 1869. Indeed, were nothing to be considered but the words of these two statutes, it is evident that a licence would be required, and duty would be payable, in respect of him. But for many years it has been held that the words in s. 19, sub-s. 3, are to be understood in a restricted sense, and that the tax is intended to be imposed on such as keep male servants of the class referred to for purposes of luxury, or dignity, rather than as a means towards gaining a living. This may, in its origin, have been the intention of this particular form of taxation; but confusion has arisen by reason of the wealthy or ambitious trader adopting into his business some of the characteristics of those private

(1) The judgments were all written.

1915

LONDON COUNTY COUNCIL v. PERRY.

Darling J.

establishments, including or consisting of menial servants, which at first alone bore the tax. It might with justice, perhaps, be suggested that the present puzzle is due to the actual existence amongst us of Molière's imagined hybrid, the Bourgeois Gentilhomme, and that taxation and gentility should still go together.

In the course of the arguments many cases were cited, and I do not think that they can be reconciled with each other. For example, it seems to me that by the reasoning which resulted in holding, in *Whiteley* v. *Burns* (1), the house-steward and the cooks to be outside the tax, the porter to the flats in *Marchant* v. *London County Council* (2) should have been likewise immune. But if that porter be within the taxable class, so, I should say, was the coachman, or driver, in *London County Council* v. *Allen.* (3) It is, I think, plain that Scrutton J. in *Wolfenden* v. *Mason* (4) could not really reconcile the case of *London County Council* v. *Allen* (3) with that of *Marchant* v. *London County Council* (2), and his language leads me to think that he was not of opinion that the judgment in *London County Council* v. *Allen* (3) was right, since he gave a totally different reason, that of expediency, for holding that it should be followed. In *Marchant* v. *London County Council* (2) Lord Alverstone C.J. conclusively refutes the contention that all male servants employed for the purposes of trade are exempt from the tax. Therefore, if this driver of a motor car is employed merely for such ends, he is not necessarily exempt. He would not, however, have been taxable at all but for the Motor Car Act, 1903, s. 13, which expressly places "a person employed to drive a motor car" in the list of taxable male servants as set forth in the Revenue Act, 1869, s. 19.

It is said that the Legislature cannot have intended to impose a tax in respect of any servant employed to drive a motor car for trade purposes. The reply (sufficient as it seems to me) is that in such case nothing would have been easier than to provide an exemption. Should it be said that a male servant driving a horse and cart for such trade purposes as this upholsterer's is not taxed, I would point out that neither does he require a licence to drive, and also that the doctrine of taxing the luxurious

(1) [1908] 1 K. B. 705.
(2) [1910] 2 K. B. 379.
(3) [1913] 1 K. B. 9.
(4) 110 L. T. 31.

in these matters may have influenced the Legislature to differentiate between the humbler and the prouder trader, conveyance, and conductor. But I desire to confine my judgment to such motor cars as precisely resemble in their kind and their user the one here in question, to limit my decision to male servants employed, as was this one, in a quasi-domestic capacity, and to afford no colour for a contention that a driver not having any of the signs or attributes of a menial servant would come within the purview of these taxing statutes.

BANKES J. The question for our determination is whether the magistrate was right in dismissing an information preferred against the respondent for employing a male servant without having a licence.

The facts, as found by the magistrate, are that the man in question was employed by a firm, of which the respondent was a member, at weekly wages to drive a motor car which was used by the respondent exclusively for business purposes. The magistrate also finds that the man was in the exclusive service of the firm, and he describes him as a man servant. The magistrate dismissed the information on the ground that the man in question was not employed to drive the car for "domestic purposes." The statutes imposing the duty are the following:— The Revenue Act, 1869, which by s. 18 provides that the duty upon every male servant shall be 15*s.*, which shall be paid annually upon a licence to be taken out by the person who shall employ the servant, and in s. 19 sets out a list and description of the persons who for the purposes of the Act are to be treated as male servants and creates certain exemptions. The Customs and Inland Revenue Act, 1876, s. 5, creates certain further exemptions in that it provides that occasional or partial employment in any of the capacities named in the previous Act shall not under certain conditions subject the employer to the tax, and further that a person, who has been bona fide engaged to serve his employer for a portion only of each day and does not reside in his employer's house, shall not be included in the term "male servant." The statutory list of male servants, which is contained in the Act of 1869, does not include any reference to a motor car

1915

LONDON COUNTY COUNCIL v. PERRY.

Bankes J.

driver, and it was not until 1903 that such a person was first made taxable. The inclusion was made by ss. 13 and 20 of the Motor Car Act, 1903, which provided first of all that the definition of "male servant" in sub-s. 3 of s. 19 of the Revenue Act, 1869, as amended by s. 5 of the Customs and Inland Revenue Act, 1876, should be read as if a person employed to drive a motor car was included in that definition, and defined "motor car" as having the same meaning as the expression "light locomotive" in the Highways and Locomotives Act, 1896. In that Act the vehicles referred to as light locomotives are (s. 1) any vehicle propelled by mechanical power if under three tons weight unladen and not used for the purpose of drawing more than one vehicle, and so constructed that no smoke or visible vapour is omitted therefrom except from any temporary or accidental cause.

The provisions of these combined statutes therefore are that, if no qualification is to be given to the language used, every person who employs a man as a servant to drive such a vehicle is liable to the tax unless he comes within any of the statutory exemptions, which this man does not. This is no doubt a very wide-reaching construction to be placed upon these Acts, and it includes the drivers of very many classes of vehicles, which it seems unlikely that the Legislature could have intended to tax, and whom in practice the Inland Revenue authorities do not attempt to include as taxable male servants. The question which we have to consider is not whether the Legislature have by inadvertence cast the net too wide, or more widely than they intended, but whether any ground exists in the language and scope of the statutes for imposing any limitation on the general language used.

The question has been before the Court on previous occasions in other forms, and various and, as it seems to me, conflicting opinions have been expressed upon it. The first case to which we were referred was *Spencer* v. *Sheerman* (1), where a number of waiters at an hotel, not on the permanent staff but nevertheless employed for considerable periods of time, were held to be male servants within the Act. To meet (inter alia) the case of mere

(1) 23 L. T. 873.

occasional employment, referred to in argument in this case, the Act of 1876 appears to have been passed, and I think it is important to notice that the exemption in favour of a person employed for a portion only of a day does not include such a person if residing in the employer's house. This seems to me to point to an intention on the part of the Legislature to indicate that membership of the household was to be taken into consideration as well as the nature of the service in considering whether any particular person was taxable or not.

The next case in order of date was *Whiteley* v. *Burns* (1), where the question was whether thirty-five men employed by Whiteley, four as cooks and the remainder in serving and attending to the meals of the shop assistants, were liable to tax. I do not think that this case can be regarded as any longer of any authority on the question of law. The judgment of Lord Alverstone C.J. apparently decides that none of the persons referred to were taxable either because they were employed in trade or because they were not in fact waiters. The latter ground does not cover the case of the four cooks, and the first ground has been disclaimed by Lord Alverstone C.J. in subsequent judgments. In 1910 the case of *Marchant* v. *London County Council* (2) was decided, in which the case of a house porter employed at a block of flats had to be considered. The flats in question were two blocks consisting of four floors each above the ground floor, let out to residential tenants, and in possession of a receiver who managed them. He employed the house porter, who was held liable to tax upon the ground that he did not come within any of the statutory exemptions, and no reference was made to the question of whether the man's duties brought him within the category of a domestic servant.

Another case to which we were referred is *London County Council* v. *Allen* (3), in which the question was whether the driver of an omnibus employed by the county council to convey defective children to school was taxable as a coachman. In argument for the respondent it was contended that the persons specified in the statutory list in s. 19 of the Act of 1869 were all persons engaged

(1) [1908] 1 K. B. 705. (2) [1910] 2 K. B. 379.
(3) 1913] 1 K. B. 9.

1915

LONDON COUNTY COUNCIL v. PERRY.

Bankes J.

in discharging duties of domestic and personal service. Lord Alverstone C.J. agreed with this contention to the extent of holding that, in his opinion, the expression "coachman" in the Act meant the driver of a carriage for the purposes of pleasure or for domestic purposes. With this view Channell J. agreed. Avory J. went further and held that all the words in the statutory list were descriptive of, and intended to apply to, persons who are employed for domestic purposes or for purposes of pleasure.

The last case was *Wolfenden* v. *Mason* (1), in which the question was whether the servant was employed as a groom, and if so whether he was liable to the tax. Bailhache J. decided that he was not liable upon the ground that the magistrates had found that the man was a mere farm servant, and not a groom. Scrutton J. also held that the man was not liable, but upon the ground that the justices had found that the man was a groom but employed for trade purposes, and consequently within the decisions which the learned judge considered had held that employment for the purposes of trade did not bring a servant within the statute. Ridley J. differed upon the ground that the man was clearly a groom, and that the cases did not decide that a person employed for the purposes of trade was exempt.

Under these circumstances no help can be derived from these decisions, taking them as a whole. We were referred by Mr. Murphy to the case of *Nicoll* v. *Greaves* (2), where Erle C.J., in referring to the Acts imposing taxes on male servants, says that they seem to have drawn the line between persons employed in a service of luxury, in respect of whom the master is taxable, and those of necessity, such as servants in trade and husbandry, in respect of which he is not taxable. The Chief Justice was, I think, there speaking of Acts which include an exemption in favour of persons engaged in trade, and I do not think that his observations are of much assistance with regard to the existing statutes, which contain no such exemption. I do think, however, that the language of the older statutes is very material in a consideration of the point which we have to decide. The first statute to which I propose to refer is the statute of 1803, 43 Geo. 3, c. 161, where the duty on male servants is contained

(1) 110 L. T. 31. (2) 17 C. B. (N.S.) 27, 35.

in Sched. C, and it is expressed to be, as to No. 1, a duty on every male servant employed or retained in the several capacities therein mentioned. This list is substantially the same as that in the Act of 1869; but what is important to notice with regard to the Act of 1803 is that, in the rules for charging the duties, the person liable to the duty is described as the master or mistress of the servant. This expression is itself, I think, strongly suggestive of the relationship of domestic or menial service; and this is made clear when you find that rules are inserted expressly for dealing with the case of servants who, though employed in one of the named capacities, might not under the particular circumstances of their employment be considered to be domestic or menial servants. For instance, servants employed in taverns and inns; certain classes of jobbing gardeners; apprentices; gamekeepers employed to preserve game for other people, and men employed in racing stables by any master or mistress. This view of the statute is, I think, strengthened by a reference to Sched. C, No. 3, which contains a list of persons some of whom may be and some of whom may not be in domestic or menial service. There the duty is to be paid by the employer, or by the master or mistress, as the case may be, indicating that the expression "master" or "mistress" is not used unadvisedly in the earlier part of the schedule. The same observation applies to the Act of 1853 (16 & 17 Vict. c. 90), which is the last to which we were referred. There the statute speaks of the master of the servant as the person chargeable with the duty, and the list of servants is substantially the same as had appeared in all the previous taxing statutes.

I now come to the language of the Act of 1869. The list of servants is substantially that carried forward from the previous statutes. Is there anything in the statute to indicate that the Legislature intended to include any additional classes of male servants? I think not. It is true that the statute does not use the expression "master" or "mistress" in relation to the list of servants; but the scheme of the Act is different. Sect. 22 requires every person employing any male servant to make the necessary declaration and to pay the duties. I do not think this change of language is sufficient to effect so material an

1915

LONDON COUNTY COUNCIL v. PERRY.

Bankes J.

alteration in the list of taxable servants as is now contended for In my opinion the history of the previous legislation indicates that the Act of 1869 is dealing with a limited class of servants, namely, menial and domestic servants, using those expressions in their original meaning as indicating persons who are members of the household or establishment. In every case it must be a mixed question of fact and law as to whether any particular person comes within the statutory list of male servants contained in s. 19 of the Act of 1869. To bring a person within the section he must be (1.) employed as a servant; and (2.) either wholly or partially employed in one of the named capacities, or in any capacity involving the duties of any of the named descriptions of servants; and (3.) he must be employed as a domestic or menial servant. No general rule can be laid down as to who does and who does not come within that category. It is an implication of law attachable to the contract: see Morris C.J., *Lauler* v. *Linden*. (1) It is often a useful test to consider the personal relations of the master to the servant, as was done in *Nicoll* v. *Greaves* (2), or to consider whether the servant is a member of the employer's household or establishment, as was done in *Nowlan* v. *Ablett* (3), where Lord Abinger, in speaking of a head gardener, says that he would himself have directed the jury that the man was a menial servant, for, though he did not live within the defendant's house or within the curtilage (intra moenia), he lived in the grounds within the domain. It is, I think, quite clear that there is no longer any trade exemption, and that a servant though employed for trade purposes may yet be a taxable servant.

I do not myself think that the question of whether a servant is employed for the purposes of pleasure is a test which should be adopted. I think that the points to which attention should be confined are two, namely, what are the duties performed by the servant; secondly, do the terms of his engagement as servant indicate that his duties are of a domestic or menial nature? If the answer to the last question is in the affirmative, and the duties are any of those enumerated in the statutory list, the

(1) (1876) I. R. 10 C. L. 188, 190. (2) 17 C. B. (N.S.) 27.
(3) (1835) 2 Cr. M. & R. 54.

servant is, unless he comes within some statutory exemption, taxable; otherwise he is not.

I am not satisfied that the magistrate in the present case has applied the proper test, and I think the case must go back to him. It may be that there are further facts, bearing on the real question which he has to decide, which at present are not before him. But in any event I consider that the ultimate decision of the question, so far as it depends upon the facts, is for the magistrate, and not for this Court.

AVORY J. The question to be decided in this case is whether the driver of a motor car, adapted to be used and used for trade purposes only, who is employed in the manner described in the special case, is a male servant within the meaning of s. 19, sub-s. 3, of the Revenue Act of 1869.

I think the judgment in *London County Council* v. *Allen* (1) governs the present case, and I see no reason to doubt that that decision was right. It was pointed out in that case that the mere fact that the servant is employed for trade purposes only does not exempt the employer from liability to the duty, but that the question to be determined in each case was whether the servant comes within the category of male servants who are intended to be included in the section, and that he does not come within the category unless he is employed for some domestic purpose or purpose of pleasure. This means, I think, in other words, unless he is employed in some domestic or menial capacity or in connection with an establishment maintained for pleasure or luxury. In my opinion a servant may be employed in connection with a trade or profession, and the sole object for which he is employed may be to further the purposes of the trade or profession, and yet he may be serving in a domestic or menial capacity and so come within the category, as in the case of the house porter in the case of *Marchant* v. *London County Council* (2), or in the case of a coachman or chauffeur who drives a financier to the City.

In the present case I think the driver of this motor car was not employed for any such domestic purpose or in any such

(1) [1913] 1 K. B. 9. (2) [1910] 2 K. B. 379.

1915

LONDON COUNTY COUNCIL v. PERRY.

AVORY J.

capacity, but that he was in the same position as the driver of the ordinary tradesman's cart or van, as to whom it has never been suggested that the duty under this statute was payable. It is contended for the appellants that the effect of s. 13 of the Motor Car Act, 1903, is to make every driver of a motor car a male servant within the meaning of s. 19 of the Act of 1869. I think the only effect of that section is to put such driver in the same position as if he were a coachman, or specifically mentioned among the other servants in the section, and the question still remains whether in the particular case he is such a male servant as is intended to be included in the section.

I do not think the case of *Marchant* v. *London County Council* (1) is in any way inconsistent either with this view of the present case or with the case of *London County Council* v. *Allen*. (2) The ground of decision in *Marchant* v. *London County Council* (1) was that, though employed in connection with the trade of letting flats, the servant was in fact employed in a domestic capacity, namely, that of house porter, and in that capacity served the tenants of the several flats; and, further, I do not think the exemptions specified in s. 19, sub-s. 5, imply that every coachman or driver of a motor car who is not specifically exempted is a male servant within the meaning of the section. The coachman who is hired out by a livery stable keeper would ordinarily be employed in a domestic or menial capacity, and it may be that he and the driver of a hackney carriage, driving passengers, would, as was contended in *London County Council* v. *Allen* (2), have been deemed to be coachmen within the meaning of the section but for the exemption. The servant of the hotel keeper or licensed victualler might also have been said to be employed in a domestic or menial capacity but for the exemption.

For these reasons I should have come to the conclusion that the magistrate was right in holding that the driver of the motor car in question was not a male servant in respect of whom duty was payable; but as the majority of the Court think that the case should go back to him for reconsideration, in the light of their judgments, I do not dissent from that conclusion.

(1) [1910] 2 K. B. 379. (2) [1913] 1 K. B. 9.

1915

LONDON COUNTY COUNCIL v. FERRY.

LUSH J. The respondent is a member of a firm of upholsterers. The firm own a motor car, which they use only for the purposes of their business. It is driven by a driver in their exclusive employment. The respondent often, though not always, is driven in the car, which takes samples round to customers. The driver occasionally gives the respondent lessons in driving; he wears the ordinary chauffeur's livery. The car has two seats only, the interior of the car having been altered to adapt it to the carriage of samples and other parcels.

The question for our decision is whether the driver is a "male servant" in respect of whom the annual tax of 15*s.* is payable under the Revenue Acts. The learned stipendiary magistrate held that he is not, but stated a case for the opinion of the Court. He held that the expression in the Motor Car Act, 1903, "a person employed to drive a motor car," must be construed in the same way as the words which describe or define a male servant in s. 19 of the Revenue Act, 1869, and that, as those words, he said, only apply to a person employed to drive for "domestic purposes," the tax was not payable because the driver was not employed for "domestic purposes" or for "pleasure," but only for "trade purposes." In answer to the contention that was raised, that he was employed to give the respondent lessons in driving, the magistrate held that that was only an occasional or partial employment, and that, the driver being "bona fide" employed in a different capacity, s. 5 of the Customs and Inland Revenue Act, 1876, applied and relieved the respondent from liability.

The question that is raised has been the subject of different and, I think, irreconcilable decisions. The two decisions which the magistrate followed—*London County Council* v. *Allen* (1) and *Wolfenden* v. *Mason* (2), which followed the decision in *Whiteley* v. *Burns* (3)—support the view which he took. I find it impossible to reconcile those decisions with the judgment of the Divisional Court in *Marchant* v. *London County Council* (4), where it was held that it was no answer to a claim for the payment of the tax that the servant was employed for purposes of trade and not for

(1) [1913] 1 K. B. 9.
(2) 110 L. T. 31.
(3) [1908] 1 K. B. 705.
(4) [1910] 2 K. B. 379.

1915

LONDON COUNTY COUNCIL v. PERRY.

Lush J.

domestic purposes or for pleasure. We have to say what is the true test to apply.

Now, when one considers the history of the legislation which deals with this particular tax, and the language of s. 19 of the Act of 1869, one cannot, I think, say that there is any exemption from the tax merely because the person employed is employed in or for the purposes of trade. Unless he falls within one of the specified trade exemptions, the fact that he is employed in or for the purposes of trade is, in my opinion, not decisive of the question. Mr. Bodkin pointed out that, whereas the earlier Acts, beginning with 17 Geo. 3, c. 39, contained a general trade exemption, that exemption was omitted in the Act 16 & 17 Vict. c. 90 and in the Act of 1869, specific trade exemptions being permitted in certain defined cases, and in those cases only. One must therefore consider whether the Legislature intended that all persons employed in any of the capacities enumerated in s. 19 of the Revenue Act, 1869, including all drivers of motor cars, should be the subject of the tax, or if not, what is the true test to apply in order to determine whether the tax is payable. Now I cannot see any real distinction between the tests suggested by Mr. Bodkin and Mr. Murphy. Mr. Bodkin did not contend, as I understood him, that every person who is employed to drive a motor car of every description is a "male servant" within the meaning of s. 19 of the Revenue Act, 1869. The term "motor car," for the purpose under discussion, includes all motor vehicles up to three tons in weight (see s. 20 of the Motor Car Act, 1903, and the interpretation clause in the Light Locomotives Act, 1896). He said that it was only payable if the driver forms part of the "establishment" of his employer. This seems to me to correspond in substance with the test suggested by Mr. Murphy, who said that the employee must be a "menial" servant, a servant, that is, who renders services of a personal or menial nature. He certainly must be a "servant," and not merely a person who is employed, as the Act only applies to persons who are "male servants," and, in my opinion, the word "servants," in this connection, means persons who come within the class ordinarily described as "menial" servants. The distinction is not between persons employed for purposes of trade and persons employed for

pleasure, but between persons who render "menial" or personal services to their employer and persons who do not. It is to the nature of the services rendered that one must look, and not to the purposes for which he is employed. Thus, a lodging-house keeper may employ a waiter to wait on the lodgers; he is employed for the purposes of his employer's trade, but he may be none the less a "male servant." A florist, on the other hand, may employ a number of gardeners who, though gardeners are mentioned in the Act, are not "servants" at all, in the sense in which that word is used in these statutes.

Now the learned magistrate does not appear to me to have applied this test. The test that he seems to me to have applied was, what are the purposes for which the person in question was employed; and this, I think, is wrong. The question whether any particular employee renders menial or personal services, or whether he is only employed to earn profits for his employer, not coming into any personal relations with his employer, must always be a question of fact, and I think that the case ought to be remitted to the magistrate for him to say within which of the two classes of employees this driver comes, having regard to the nature of the services that he renders to the respondent.

ATKIN J. The Revenue Act of 1869, by s. 18, provides that there shall be paid for the use of Her Majesty for every male servant the annual duty of 15*s*., and in s. 19 "male servant" is defined. By the Motor Car Act of 1903, s. 13, it is provided that the definition of "male servant" in the above-mentioned Act shall be construed as if a person employed to drive a motor car were included in that definition. In this Act "motor car" has the same meaning as "light locomotive" in the principal Act, being the Locomotives on Highways Act, 1896, and by reference is defined as any motor car weighing less than three tons. The Motor Car Act of 1903 introduces provisions for the registration of motor cars, for licensing the drivers of motor cars, for constituting offences in respect of the driving of motor cars, and for restricting the speed of motor cars. The word has plainly the same meaning throughout the Act, and extends to

1915

LONDON COUNTY COUNCIL v. PERRY.

Atkin J.

all motor vehicles whether constructed for trade purposes or not. If, therefore, the result of s. 13 of the Act is to include under the head of "male servant," for whom duty is payable, the driver of every motor car without restriction, a duty is imposed in respect of the driver of every trade motor vehicle throughout the country, and it is in view of this contention that this case becomes of wide general importance.

On reference to the list of "male servants," in respect of whom duty is imposed by the Act of 1869, it is to be noticed that all the servants there mentioned are servants who fall within the category of servants employed for domestic or menial purposes. The history of the taxation of male servants under that title begins in the year 1779, and until the Act of 1853 (16 & 17 Vict. c. 90) the taxation was confined, with a few exceptions by express statutory exemption, to servants employed for private purposes only. By the Act of 1853 all exemptions of the servants employed for trade purposes were swept away, and since that date no such exemption has existed. Nevertheless, it appears to me impossible to hold that the Acts of 1853 and 1869 applied to persons employed in the capacities mentioned without any restriction. The list of male servants contains, as it always has contained, amongst other words, the words "cook," "confectioner," "gardener"; but cooks, confectioners, and gardeners are undoubtedly employed in numerous businesses, cookshops, confectioners' shops, wholesale and retail, and by market gardeners and florists respectively, and I cannot construe the Acts of 1853 or 1869 as bringing under taxation for the first time the businesses employing such persons. It is conceded in fact that the Acts have never been administered as imposing such taxation. It appears to me clear that the Act of 1869, though containing words which in one sense might apply to persons employed in the operations of manufacture or horticulture, was intended to have a narrower meaning. The narrower meaning is to be derived from considering the list as a whole: noscitur a sociis. It appears to me that only those cooks, confectioners, and gardeners are included who are employed in the capacity of domestic or menial servants, to render personal service for the comfort and enjoyment of their

master, his family, guests, servants, or other persons indicated by him, as part of his domestic establishment. This does not exclude employment of male servants for trade purposes. A tradesman or manufacturer may employ such persons for the purposes of his business to render such domestic services to himself or his business staff or his customers. He may, for the purposes of his business, employ a cook, footman, coachman, waiter, all rendering services of such a nature as to come within the category of personal relationship that I have mentioned. It may be his business to employ servants for that very purpose, as in the case of hotel keepers and restaurant keepers; in such cases, subject to statutory exemptions, the employer is liable to taxation. But if the servant is employed for business purposes in such a way that his services are not of that domestic personal character that I have described, then, though he may come under the style named in the definition, he is not taxable. It appears to me to be a question of fact in each case whether the circumstances of a man's employment are such as to indicate that he is employed to render services involving the personal relationship above mentioned. That he is engaged for trade purposes affords no exemption, for he may be employed for the purposes of trade to render domestic and menial services; but if in the course of trade he is not so employed he is not taxable.

In the present case I think that counsel for the appellants shrank from going the whole length of making the contention that there are now no restrictions, but the contention as to the unrestricted taxability of motor-car drivers was apparently made before the magistrate; and, on the other hand, the respondent seems to have contended that employment for trade purposes was sufficient to exempt. I am inclined to think that the magistrate had in his mind the distinction I have drawn, but I think it more satisfactory that the case should be remitted to him and dealt with on the facts in the light of the decision of this Court.

We were referred to various cases on the subject, some of which appear to me to be in direct conflict, and it has been necessary to deal with the question apart from authority. I

1915

LONDON COUNTY COUNCIL v. PERRY.

consider, however, that the view I have expressed above is substantially that of the Court in *London County Council* v. *Allen* (1), especially as expressed in the judgment of Avory J.

Case remitted.

Solicitor for appellants: *Edward Tanner.*

Solicitor for respondent: *The Solicitor to the Treasury.*

J. H. W.

1915

Feb. 23; *March* 1.

THAMES AND MERSEY MARINE INSURANCE COMPANY *v.* BRITISH AND CHILIAN STEAMSHIP COMPANY.

Marine Insurance—Ship valued in Policy at less than Real Value—Collision Action—Loss recovered by Assured on Basis of Real Value—Subrogation of Underwriters paying on Total Loss—Extent of their Rights against Assured.

A ship was insured for 45,000*l.* on an agreed value of 45,000*l.* As the result of a collision with another ship she was sunk, and the underwriters paid the amount insured as for a total loss. In an action of collision in the Admiralty Division both ships were held to blame, and the owners of the insured ship were held entitled to recover from the owners of the other ship five-twelfths only of their loss For the purposes of that judgment the value of the ship was taken at its actual value, which was 65,000*l.*, and the assured were paid five-twelfths of that sum. The underwriters claimed to be subrogated to the rights of the assured in respect of the amount so recovered:—

Held, that as the amount so recovered by the assured did not exceed the amount paid by the underwriters on the policy, the underwriters were entitled to recover from the assured the whole of the amount recovered by them in the admiralty action notwithstanding that it was based upon a value which was higher than that agreed in the policy.

North of England Insurance Association v. *Armstrong* (1870) L. R. 5 Q. B. 244 followed.

TRIAL of action before Scrutton J. without a jury.

By a policy of marine insurance dated June 6, 1912, the plaintiffs insured the defendants' ship *Helvetia*, valued at 45,000*l.*, against the ordinary perils to the extent of 1800*l.*, for twelve months from May 20, 1912, to May 20, 1913, the balance of the

(1) [1913] 1 K. B. 9.

1915

THAMES AND MERSEY MARINE INSURANCE COMPANY v. BRITISH AND CHILIAN STEAMSHIP COMPANY.

45,000*l.* being insured with other underwriters. The policy contained the usual collision clause. On July 27, 1912, the *Helvetia* sank after a collision with the ship *Empress of Britain* and became a total loss. A collision action was brought in the Admiralty Division, in which both ships were held to blame, the *Helvetia* being held liable to pay seven-twelfths of the damage, and the *Empress of Britain* five-twelfths. After the judgment in that action the underwriters on the *Helvetia* paid a total loss. At the time of the loss the *Helvetia* was chartered to the Dominion Coal Company for a period of seven St. Lawrence seasons commencing with the spring of 1911. The claim of the owners of the *Helvetia* was subsequently filed, in which they claimed 75,000*l.* for the value of the ship, and 24,320*l.* for loss of profit on the charter. The registrar valued the *Helvetia* as in November, 1912, at the end of the current St. Lawrence season at 65,000*l.*, and the value of the charterparty at 2000*l.* from the time of the loss up to November 15, 1912. On appeal the President held that the damages had been assessed on a wrong footing, and that, on the principle laid down in *The Racine* (1), the value of the ship should have been taken at its prospective value at the expiry of the charter in November, 1917, and the value of the charterparty as being the profits for the five seasons that it had to run, and he sent the matter back to the registrar for assessment on that basis. The parties then effected a compromise and agreed that 67,000*l.* should be taken as representing the aggregate of the value of the ship and that of the charterparty, without specifying how they were to be apportioned. A sum of 26,900*l.*, which represented the five-twelfths of 65,000*l.* less certain costs and other charges, was paid to the defendants by the owners of the *Empress of Britain*. The plaintiffs claimed to be subrogated to the rights of the defendants in that sum after giving them credit for a sum of 19,660*l.* which was due from the plaintiffs to the defendants under the collision clause in the policy. The difference between those two sums was 7240*l.*, and the action was accordingly brought to recover 289*l.* 11*s.* 7*d.*, which represented the plaintiffs' proportion, $\frac{1800}{45,000}$ of 7240*l.* The defendants contended that

(1) [1906] P. 273.

1915

THAMES AND MERSEY MARINE INSURANCE COMPANY v. BRITISH AND CHILIAN STEAMSHIP COMPANY.

the plaintiffs were bound by the valuation of the *Helvetia* as agreed in the policy, and were not entitled by way of subrogation to more than their proportion of five-twelfths of the amount of such valuation, on which basis, after the plaintiffs had been debited with their proportion of the loss due to the defendants under the collision clause, nothing remained due to the plaintiffs.

Maurice Hill, K.C., and *D. Stephens*, for the plaintiffs. It is not disputed that the insurable value of the ship was 45,000*l.*, for that was the value agreed in the policy, and by s. 27, sub-s. 3, of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), "The value fixed by the policy is as between the insurer and the assured conclusive of the insurable value of the subject intended to be insured." On the one hand, if the value expressed in the policy is more than the real value for which underwriters have insured the ship, and the assured in a collision action recover the real value from the wrong-doing ship, the ship is to be treated as uninsured to the extent of the difference between the two values, and the underwriters are only subrogated to the rights of the assured in respect of a proportion of the sum recovered: *The Commonwealth.* (1) On the other hand, if the value in the policy is, as in the present case, less than the real value on the basis of which the damages in the collision action are recovered, the insurers are subrogated to the whole of the assured's rights in the damages recovered up to the amount that they have paid on the policy: *North of England Insurance Association* v. *Armstrong.* (2) As the plaintiffs have paid under the policy a sum far exceeding 289*l.* 11*s.* 7*d.*, the amount now claimed, they are entitled to recover that amount from the defendants.

Leslie Scott, K.C., and *Raeburn*, for the defendants. Where in a policy of marine insurance the value of the ship is specified, "in all questions of indemnity . . . . the parties to the policy, insurers and insured, have agreed that though the ship may in truth be much more valuable, the value is to be taken" at the specified figure "only. There is no exception. The agreement is to apply in all cases of indemnity which may arise": per

(1) [1907] P. 216. (2) L. R. 5 Q. B. 244.

Lord Shand, *Steamship Balmoral Co.* v. *Marten.* (1) Subrogation is a principle of equity which is applicable to all contracts of indemnity, and the insurer is subrogated to the assured's rights only to the extent to which the latter was entitled to be indemnified. Here the defendants have recovered under the policy for a total loss upon an agreed value of 45,000*l.* By a decree of the Admiralty Division they were held entitled to recover in the collision action five-twelfths of their loss. As between the plaintiffs and the defendants that loss was 45,000*l.* To their rights in that respect the plaintiffs are subrogated. They are consequently entitled to recover five-twelfths of 45,000*l.* and no more.

The case of *North of England Insurance Association* v. *Armstrong* (2) was wrongly decided. It was based on a confusion between subrogation and abandonment. It was questioned by Lord Blackburn in *Burnand* v. *Rodocanachi* (3), where he said: "I own that if I had a similar case to decide sitting in the Court of Error, I should pause before I said that it was rightly decided." If, however, the insured value of the ship is not to be treated as the value for the purposes of the plaintiffs' subrogation, the value must be ascertained by evidence. It cannot be the 65,000*l.* fixed by the registrar, for that figure, upon the basis of the President's decision, must have included five seasons' profits of the charter-party from November, 1912, to November, 1917. The insurer is only subrogated to the rights of the assured in respect of "the subject-matter insured": s. 79, sub-s. 1, of the Marine Insurance Act, 1906. The subject-matter insured in this case is the ship, and does not include any profits which the ship might earn under the charter: *Sea Insurance Co.* v. *Hadden.* (4)

[Evidence was then taken of average adjusters, brokers, and others, who agreed that the only practicable way of arriving at the prospective value of the ship in November, 1917, in accordance with the judgment of the President, was to take the original cost of the ship, which was admitted to be 50,000*l.*, and deduct from that sum 4 per cent. or, according to some of the witnesses,

(1) [1902] A. C. 511, at p. 515.
(2) L. R. 5 Q. B. 244.
(3) (1882) 7 App. Cas. 333, at p. 342.
(4) (1884) 13 Q. B. D. 706.

1915

THAMES AND MERSEY MARINE INSURANCE COMPANY v. BRITISH AND CHILIAN STEAMSHIP COMPANY.

5 per cent. per annum for the five years that the charter had to run in respect of depreciation by wear and tear. That would work out at a figure below the insured value of 45,000*l.*]

Having regard to the evidence the plaintiffs in any view are not entitled to recover upon the basis of a value of more than 45,000*l.*

Maurice Hill, K.C., in reply.

Cur. adv. vult.

March 1. SCRUTTON J. read the following judgment:—The Thames and Mersey Marine Insurance Company, whom I will call "the underwriters," sue the British and Chilian Steamship Company, whom I will call "the shipowners," for a small sum of money under the following circumstances.

By a policy dated June 6, 1912, the underwriters insured to the extent of 1800*l.* the shipowners' ship *Helvetia*, valued at 45,000*l.*, against the ordinary sea perils, with the ordinary running down clause against sums the shipowners became liable to pay by reason of collision. Other underwriters insured the rest of the 45,000*l.*, so that the insured value was wholly covered by insurance. During the currency of the policy, the *Helvetia* came into collision with the *Empress of Britain* and was totally lost. The consequent collision action was, as is somewhat unusual, fought by the shipowners and not by their underwriters. Both ships were held to blame, and the blame was apportioned, the owners of the *Helvetia* having to pay seven-twelfths of the damage, and the owners of the *Empress of Britain* five-twelfths of the damage. The next thing was to assess the value of the shipowners' loss. The *Helvetia* was at the time of the collision under a charter dated November 17, 1909, commencing in the spring of 1911, to run through seven consecutive St. Lawrence seasons, which would expire in the autumn of 1917. The shipowners claimed 75,000*l.* as the value of their ship and 24,320*l.* as the value of the charter. The registrar, purporting to follow the decision in *The Racine* (1), took the value of the ship as at November 15, 1912, the end of the current season, and fixed it at 65,000*l.* He took the loss of hire up to the same date and

(1) [1906] P. 273.

assessed it at 2000*l.* The shipowners appealed, and the President held that, on the true construction of the judgments in *The Racine* (1), the value of the ship should be taken in November, 1917, and the hire assessed to that date, and remitted the report to the registrar for reconsideration of the figures on that basis. When the parties came before the registrar they compromised and agreed on a lump sum of 67,000*l.* for the two items under consideration, being the same total as the registrar had awarded, without apportioning it. The owners of the *Empress of Britain* had indeed no interest in apportionment; the shipowners who were under-insured as to ship and uninsured as to freight may have thought the apportionment would affect their insurance prospects, or they may have thought nothing about it. Five-twelfths of 67,000*l.* was accordingly paid, being 26,000*l.* odd. The underwriters who had paid for a total loss of the ship *Helvetia* then claimed to be subrogated to the payment received for the loss of that ship from the *Empress of Britain*. The shipowners replied that this payment was based on a value not the insured value, and that the underwriters could only recover five-twelfths of the insured value (45,000*l.*), which when set off against the sums due from the underwriters under the running down clause left nothing payable. The question, which involves difficult problems both of law and fact, therefore was: On what principles and to what sums were the underwriters entitled to claim subrogation?

The subject of the relation of an agreed insured value to claims for sums fixed on the basis of another value gives rise to considerable difficulties, and has been the subject of several decisions. In all the disputes, each side vehemently accuses the other of seeking to reopen the value in the policy. In settling whether a vessel is a constructive total loss, in the absence of special provision only the real value is looked at, while when the vessel is found to be a constructive total loss only the insured and agreed value is paid. In *Steamship Balmoral Co.* v. *Marten* (2), under a policy on ship valued at 33,000*l.*, claims for general average and salvage based on a value of 40,000*l.* were made on underwriters. The House of Lords held, partly on

(1) [1906] P. 273. (2) [1902] A. C. 511.

1915

THAMES AND MERSEY MARINE INSURANCE COMPANY v. BRITISH AND CHILIAN STEAMSHIP COMPANY.

Scrutton J.

evidence of a rule of adjustment of British adjusters, partly on principle, that the underwriters were only liable to pay thirty-three-fortieths of these claims, giving rough effect to the valuation of 33,000*l.* as between shipowners and underwriters. In *The Commonwealth* (1) underwriters had insured a schooner valued at 1350*l.* for 1000*l.*; she was sunk; and in the collision action the wrong-doer was held liable to pay her value assessed in that action at 1000*l.* The underwriters, who had paid their 1000*l.* for a total loss, claimed to be subrogated to the 1000*l.* paid, but the Court of Appeal held that the 1000*l.* paid by the wrong-doer was in respect of the whole interest in the ship, which was in the policy valued at 1350*l.*, of which 1000*l.* was at the risk of the underwriters and 350*l.* uninsured at the risk of the owners, and that the 1000*l.* salvage must therefore be divided among underwriters and owners in the proportions of 1000*l.* and 350*l.* respectively, thus dealing with the whole agreed value and no more. There part of the insured value was not covered by insurance; in the present case the whole of the insured value is covered by insurance.

Lastly, in *North of England Insurance Association* v. *Armstrong* (2), in 1870, underwriters insured the *Hetton* valued at 6000*l.* for the whole amount. The *Hetton* was sunk by the *Uhlenhorst*, and in the collision action the value of the *Hetton* was proved to be 9000*l.* The *Uhlenhorst* limited her liability and only paid some 5500*l.* for damage to ship, freight and cargo. The underwriters claimed the part of the 5500*l.* which represented ship, the shipowners alleged that the underwriters were only entitled to two-thirds of it, the shipowners being treated as uninsured in respect of 3000*l.*, the difference between the collision value of 9000*l.* and the insured value of 6000*l.*, and the 5500*l.* being distributed between the 6000*l.* and the 3000*l.* in the same proportions. The Court of Queen's Bench rejected this contention, holding that it was not open to the shipowners, who had agreed that the insured value was 6000*l.*, to allege the real value was 9000*l.* Some expressions in the judgment suggest that the underwriters, who had only paid 6000*l.*, might have recovered the whole 9000*l.* if paid. They have been the subject

(1) [1907] P. 216.

(2) L. R. 5 Q. B. 244.

of much criticism and may be contrary to the principle that subrogation is to give an indemnity only, as expressed in *Castellain* v. *Preston* (1); they may result from failure to distinguish between abandonment and subrogation. But they were not necessary to the decision. The decision itself is to the effect that an underwriter who has paid a total loss is not prevented from recovering up to the extent of his payment sums received by the shipowner in respect of the subject-matter insured by the fact that those sums are based upon, or part of, a larger sum fixed by reference to a value other than the insured value, where no part of that insured value is at the risk of the shipowner. In other words, under *Armstrong's Case* (2) one underwriter of the *Helvetia* for 45,000*l.* on ship valued at 45,000*l.*, on payment of a total loss, would recover, at any rate up to 45,000*l.*, sums received from the wrong-doing ship, though based on and part of a collision value of 65,000*l.* If so, it appears to me to make no difference under *Armstrong's Case* (2) that instead of receiving the whole collision loss of 65,000*l.* the shipowner only receives five-twelfths. He has received a sum in respect of the subject-matter insured less than the underwriter's payment and is not allowed to say that it is based on a value of the subject-matter different from that agreed in the policy. He will have to hand over not five-twelfths of the insured value, but the sum he has received in respect of the subject-matter insured, being less than the insured value which the underwriter has paid. This appears to me to be the logical result of *Armstrong's Case* (2), and though it is possible that the principles on which it is based are not easy to reconcile with those on which the House of Lords decided the case of *The Balmoral* (3), the Law Lords do not mention in their judgments, and still less disapprove of, *Armstrong's Case* (2), although it was cited to them. I am therefore as a judge of first instance bound by it, and in my view it compels me to hold that the underwriters here are entitled to recover, to the extent to which they have paid in respect of the subject-matter insured, any sum which the shipowners have received as a right in respect of the loss of the same subject-

(1) (1883) 11 Q. B. D. 380. (2) L. R. 5 Q. B. 244.
(3) [1902] A. C. 511.

1915

THAMES AND MERSEY MARINE INSURANCE COMPANY *v.* BRITISH AND CHILIAN STEAMSHIP COMPANY.

Scrutton J.

matter, though that sum is based on a larger value than the insured value. This result seems to me to be expressed in s. 79 of the Marine Insurance Act. The underwriter here is asking to have all the right and remedy of the assured in respect of the subject-matter, not part of it.

The next question is what sum have the shipowners received as a right in respect of the subject-matter insured. Now the shipowner in the collision action received a sum based on 67,000*l.* in respect of the ship and the value given to the ship by the charter. It is by his doing that these two heads of damage have been mixed up so that it is not easy to apportion them, and I am not sure that it is not an answer to say that as he has mixed them up the whole sum must be taken against him as the value of ship. But the registrar, if he had separated the 67,000*l.*, would under the President's judgment have had to divide it into the value of the ship in November, 1917,—five years after the collision—and the value of the charter from 1912 to 1917. I am unable to see what the underwriter has to do with this. His insurance of ship is from May 20, 1912, to May 20, 1913; if he had no valuation the subject-matter to be valued under s. 16 of the Act is the value at the commencement of the risk of the ship, including outfit, stores, disbursements, and insurance. It is this subject-matter that is valued by the valued policy. The open policy on freight for a year under the same section would be the gross amount of freight at risk, plus insurance. The value of the ship in 1917 would have nothing to do with such a policy on ship; the value of the net freight under a five years charter would have nothing to do with such a policy on freight. But the addition of the two sums ship and freight, by either method of calculation, is supposed to represent the value of ship and freight at the time of the loss. Taking then 67,000*l.* as representing the value of ship and freight at the time of the loss, the shipowner gave evidence that the value of the ship without engagements at the time of the loss was 75,000*l.*, but with the charter was 60,000*l.*—in other words, that the charter was detrimental to the value of the ship and did not increase it. Forming my own judgment, I fix 65,000*l.* as the value of the

subject-matter insured at the time of the loss. In respect of that subject-matter the underwriter has paid a total loss, agreed at 45,000*l.* In respect of that subject-matter the assured has received at least 26,900*l.* The underwriter is entitled to be subrogated to that amount, which is less than the sum he has paid, and, after giving credit for the sum due from him under the running down clause, to recover his proportion of the excess, which I understand on this basis is admitted to be 289*l.* 11*s.* 7*d.*, and I give judgment for him for that amount with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Alfred Bright & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

J. F. C.

THE KING *v.* JUDGE AMPHLETT.

1915

Feb. 3, 10.

Coal Mines—Minimum Wage—Revision of Minimum Rates, Application for —Right of Applicants to present their Case to District Board—Coal Mines (Minimum Wage) Act, 1912 (2 *Geo.* 5, *c.* 2), *s.* 3, *sub-s.* 2.

Where an application is made by any workmen or employers under s. 3, sub-s. 2, of the Coal Mines (Minimum Wage) Act, 1912, that the existing minimum rate of wages may be varied, the applicants have a right to present their case in support of the variation to the joint district board independently, and not merely through the medium of their representatives upon the board.

Whether they are entitled for that purpose to appear before the board and be heard orally, or whether they can only submit their case and arguments in writing, is a question of procedure which it is for the board itself to determine.

So *held* by Bray and Atkin JJ. (Ridley J. dissenting).

Rule for a mandamus to the chairman of the West Yorkshire Joint District Board to hear and determine an application under the Coal Mines (Minimum Wage) Act, 1912 (1), for a variation of the existing minimum rate of wages.

(1) By the Coal Mines (Minimum Wage) Act, 1912, s. 2, sub-s. 1: "Minimum rates of wages and district rules for the purposes of this

1915

REX v. AMPHLETT (JUDGE).

A joint district board for the district of West Yorkshire was constituted for the purposes of the above Act and recognized by the Board of Trade on May 9, 1912, His Honour Judge Amphlett being appointed chairman. The board having failed to agree either as to the sub-division of the district under s. 2, sub-s. 5, or as to the minimum rate of wages for the district, left those matters to the determination of the chairman.

By an award dated June 10, 1912, the chairman divided the district into two divisions, the eastern and the western, and settled the minimum rates of wages for those divisions respectively. Amongst the coal mines in the district are a number of what are

---

Act shall be settled separately for each of the districts named in the schedule to this Act by a body of persons recognised by the Board of Trade as the joint district board for that district."

Sub-s. 2: "The Board of Trade may recognise as a joint district board for any district any body of persons . . . . which in the opinion of the Board of Trade fairly and adequately represents the workmen in coal mines in the district and the employers of those workmen, and the chairman of which is an independent person appointed by agreement between the persons representing the workmen and employers respectively on the body, or in default of agreement by the Board of Trade."

Sub-s. 3: "The joint district board of a district shall settle general minimum rates of wages and general district rules for their district . . . ."

Sub-s. 4: "The joint district board of any district may, if it is shown to them that any general district minimum rate or general district rules are not applicable in the case of any group or class of coal mines within the district, owing to the special circumstances of the group or class of mines, settle a special minimum rate . . . . or special district rules . . . . for that group or class of mines."

Sect. 3, sub-s. 2: "The joint district board of a district shall have power to vary any minimum rate of wages or district rules for the time being in force in their district—

"(*b*) after one year has elapsed since the rate or rules were last settled or varied, on an application made (with three months' notice given after the expiration of the year) by any workmen or employers, which appears to the joint district board to represent any considerable body of opinion amongst either the workmen or the employers concerned."

Sect. 4, sub-s. 2: "If the joint district board within three weeks after the expiration of a notice for an application under this Act to vary any minimum rate of wages or district rules fail to deal with the application, the chairman of the joint district board shall . . . . deal with the application . . . . in place of the joint district board."

known as thin seam mines, and in the fixing of the minimum rate of wages those mines had not been distinguished from the other or thick seam mines. The owners of the thin seam mines, some of whom were members of the joint district board, considered that the minimum rates so fixed did not fairly apply to them and were far higher than those mines could afford to pay when compared with the thick seam mines, and they accordingly made through their solicitors an application to the chairman in a letter dated March 13, 1914, which was as follows:—

"Leeds, March 13, 1914.

"*Coal Mines (Minimum Wage) Act*, 1912.

"Dear Sir,—At a meeting of a body representing the class of owners working thin seam mines we were instructed on their behalf to apply to the joint district board under s. 3, sub-s. 2 (*b*), of the above Act for a variation in the minimum rate of wages applicable to their collieries. We respectfully submit that beyond doubt they represent a considerable body of opinion amongst employers and as such come within that section. They desire the opportunity of laying their case before the joint district board in support of a special minimum rate under the circumstances set forth in s. 2, sub-s. 4, of the said Act, and they respectfully request a formal hearing of their case which will be presented by their authorized representative. Before the district board come to a conclusion as to whether they do in fact represent a considerable body of opinion as above stated they request a similar opportunity to be formally heard upon that point. The number of firms of thin seam owners which were largely represented at the meeting is nineteen, and we need scarcely say that the matter is one of the greatest importance to them and they have determined upon taking the course above referred to after carefully going into the matter and upon considered advice. We shall be glad to hear from you what arrangements can be made at an early date for this case to be presented. We have sent a copy of this letter to Mr. Day, the secretary of the employers, and to Mr. Wadsworth, the secretary of the workmen, on the joint district board for the West Riding.

"Yours truly,

"Simpson & Curtis."

1915

REX v. AMPHLETT (JUDGE).

The chairman acknowledged the letter on March 17, and a list of nineteen firms, who as thin seam owners were the applicants, was sent to him on March 19. The chairman proceeded to take steps to call a meeting of the board, but owing to some illness no meeting in fact took place till July 6 or 7, when the representatives of the owners and workmen were present, and the chairman, but no one who was not a member of the joint district board, and no notice of it had been given to the thin seam owners or their solicitors. At this meeting Mr. Crawshaw was the spokesman of the employers, and Mr. Smith was the spokesman of the men. There was a lengthy discussion of various matters relating to the minimum rate. Mr. Crawshaw put the correspondence above mentioned before the chairman, but he did not submit any resolution nor any case in writing. He said that he represented the thin seam owners as well as the whole of the West Yorkshire owners, but could not argue the question. Mr. Smith wanted, on the other hand, to do away with the east and west divisions and to constitute West Yorkshire into one district. In putting this proposition forward he argued that the nineteen owners had no good claim for a separate minimum rate, while Mr. Crawshaw contended that they had. During the meeting the nineteen owners increased to twenty-five. The chairman said he was not inclined to decide that there should be more divisions than there were before. Thus both Mr. Smith's proposal and Mr. Crawshaw's formed a part of the general discussion, but no agreement was arrived at, and in the result these two gentlemen respectively moved and seconded this resolution: "That this district board having failed to agree on the question of the minimum rates of wages applicable to the West Yorkshire district, or as to the subdivision of the district, is of opinion that any further meetings of the board are unnecessary, and agrees to leave all matters in difference to the chairman for his final determination and award." On July 21, 1914, the chairman accordingly made his award, making alterations in the minimum rates of wages and rules, and awarding that "each district shall continue to be divided as heretofore." The following letters then passed between the solicitors for the thin seam owners and the chairman:—

1915

REX v. AMPHLETT (JUDGE).

"Leeds, 25 July, 1914.

"*Thin Seam Owners.*

"Dear Sir,—At a meeting of the thin seam owners held yesterday, we were instructed on their behalf to respectfully call your attention to the fact that no final reply has been received to their request for a hearing contained in our letter to you of the 13th March last. Our clients still contend that their case comes emphatically within the provisions of s. 3, sub-s. 2 (*b*), of the Act, and that the determination of their request to represent views vitally affecting their interests ought not to be any longer delayed. We understand that an award has recently been published, but our clients instruct us to respectfully intimate that, their request for a hearing not having been adjudicated upon or determined, they are not prepared to recognize an award made under those circumstances as being binding upon them. We have sent a copy of this to Mr. Ben Day, the secretary of the employers, and to Mr. Wadsworth, the secretary of the workmen.

"Yours truly,

"Simpson & Curtis.

"To His Honour Judge Amphlett."

"Wychbold Hall, Droitwich,

"July 27, 1914.

"Dear Sirs,—In reply to your letter I can only state that it seems to me you misconceive my functions as chairman, which are only to give a casting vote in case of difference between the two classes of members of the district board. If your clients are of opinion that they are not represented, or inadequately represented on the board, the Board of Trade on application would probably deal with the matter.

"Yours faithfully,

"R. H. Amphlett."

"Leeds, 30 July, 1914.

"*Thin Seam Owners.*

"Dear Sir,—With reference to our letter to you of the 25th inst., and to yours of the 27th inst. to us, we think we ought to make it clear to you that our contention is that inasmuch

1915

REX v. AMPHLETT (JUDGE).

as the joint district board has failed to deal with our clients' application within the time limited by s. 4, sub-s. 2, of the Act, it has become your duty as chairman to deal with the application. As the matter is of vital importance to our clients we must respectfully ask you to let us know that you will deal with the application, or, if you will not, to intimate your refusal to us. You will forgive our asking you to deal with this matter promptly, because, as you are aware, it is in the circumstances very urgent.

"Yours truly,

"Simpson & Curtis.

"To His Honour Judge Amphlett."

"Wychbold Hall, Droitwich,

"1 August, 1914.

"Dear Sirs,—Apart from the rules I had two specific questions to deal with, one under s. 2, sub-ss. 4, 5, of 2 Geo. 5, and the other as to the variation of minimum wages, and my award deals with both. In my opinion s. 4, sub-s. 2, has no application and the course you suggest would be ultra vires. I have certainly been under the impression that your clients were represented on the district board, but if not, as already pointed out, your application would have to be to the Board of Trade and not to me. I must therefore leave your clients to take any course they think proper under the circumstances, as my award must stand until varied either by agreement between the parties or in manner pointed out by the statute.

"Yours faithfully,

"R. H. Amphlett.

"To Messrs. Simpson & Co."

On November 10 the applicants, the thin seam owners, obtained a rule nisi for a mandamus to the chairman commanding him to hear their application.

Sir Stanley Buckmaster, *S.-G.*, and *Branson*, for the chairman of the joint district board, showed cause. The applicants claimed to be heard in support of their application for a special minimum rate by the board and to be allowed to present their case by their authorized representative. That they are not entitled to do. No

outside person has any right of audience before the board. The words "if it is shown to them" in s. 2, sub-s. 4, mean "if it is shown by certain members of the board." The only way in which any group of employers or workmen who want an alteration of the existing minimum rate can get their views put before the board is through their representatives on the board. If the particular applicants are not sufficiently represented on the board their remedy is, as the chairman suggested, to apply to the Board of Trade to have the number of their representatives increased. Here the applicants are already specially represented, for certain members of the board are themselves owners of thin seam mines. The board when sitting for the purpose of settling a special minimum rate under s. 2, sub-s. 4, or of revising the existing minimum rate under s. 3, is sitting as an administrative and not as a judicial body. The Act does not contemplate the board hearing parties at all. Of course the board may hear any persons that they please, but they cannot be compelled to hear them.

Gordon Hewart, K.C., and *Waddy* showed cause for the workmen's section of the board. No mandamus will lie, for the jurisdiction of the chairman to entertain the application never arose. Under s. 4, sub-s. 2, the chairman's duty to deal with an application to vary a minimum rate of wages arises only if the board "for three weeks after the expiration of a notice for an application" fail to deal with it. That refers to s. 3, sub-s. 2, by which the power of the board to vary the rate arises "on an application made with three months' notice given." But the letter of March 13 contained no reference to a three months' notice, therefore the three weeks' period at the expiry of which the chairman's jurisdiction is said to have arisen never began to run. But even if there was a sufficient application to give the chairman jurisdiction the applicants had no right to be personally heard. To allow such a right would be productive of great inconvenience, for any single collier in a particular pit might claim that he represented a considerable body of opinion and demand to be heard, and the board would be bound to hear him at all events upon the preliminary question whether he did represent such a body or not.

Hon. S. Henn Collins, showed cause for the employers' section of the board.

1915

REX v. AMPHLETT (JUDGE).

Macmorran, K.C., and *Latter*, in support of the rule. At the meeting of the board on July 6 and 7 they did not deal with the application for a special minimum rate at all. Sect. 3, sub-s. 2 (*b*), expressly gives the applicants the right to make such an application, for it is not disputed that they represent a considerable body of opinion. They must be allowed to present their case to the board or chairman as the case may be. The application in the letter of March 13 was sufficient, for it referred to s. 3, sub-s. 2 (*b*), which imported that the hearing asked for was to be three months after that date. The section is satisfied if the application is made, as was the case here, at the beginning of the three months; it does not require a further application to be made at their expiry.

Cur. adv. vult.

RIDLEY J. read the following judgment:—This was a rule calling on His Honour Judge Amphlett, the chairman of the joint district board for the district of West Yorkshire, to show cause why a writ of mandamus should not issue commanding him to deal with an application of the West Yorkshire Thin Seam Owners Association contained in a letter of their solicitors dated March 13, 1914, and to hear and determine the same pursuant to the Coal Mines (Minimum Wage) Act, 1912; on the ground that such application claimed to be representative of a considerable body of opinion amongst the employers in the said district, and that the joint district board had failed to deal with the same; and on the ground that the thin seam mines are a special group or class of mines to which the general district rate was not applicable, and that a special minimum rate should be made applicable to them, and that the rates should be varied accordingly; and on the ground that the chairman had on the default of the joint district board and after request failed to hear and determine the application. [He then stated the facts as above set out, and proceeded as follows:] The question therefore raised by this rule is whether the chairman before he gave his decision was bound to hear either orally, or in writing, the case put forward by the thin seam owners, and the answer to that question must be found in the provisions of the Act of Parlia-

ment. The object of this Act was to prevent, as far as possible, strikes in the coal trade by fixing a minimum rate of wages. A number of districts were accordingly set out, for each of which there was to be a set of rules and a minimum rate of wages; and as it was obvious that such rules and rates could not be arrived at without agreement between employers and workmen, it was provided that there should be for such district a joint district board. To the Board of Trade, with this object, is given power to recognize as such a board any body of persons whether existing at the time of the Act, or constituted for the purposes of the Act, which fairly and adequately represents the workmen of the coal mines in the district and their employers, and the chairman of which is an independent person appointed by agreement between the employers and workmen, or in default of agreement by the Board of Trade itself. If there are no rules already providing for securing equality of voting power between the members representing workmen and those representing employers, and for giving the chairman a casting vote in case of difference between the two classes of members, the Board of Trade may require the joint district board to adopt such a rule; and a rule so adopted is to be deemed a rule governing the procedure of the body: s. 2, sub-s. 2. The joint district board is to settle the general minimum rate of wages and rules for the district, sub-s. 3; and they may, if it is shown to them that the general rates and rules are not applicable in the case of any group or class of coal mines within the district, settle a special rate and rules for such group or class, sub-s. 4; and they may subdivide the district into two parts, or more than two if the members of each class agree to do so, sub-s. 5. It seems to me impossible so far not to see that the object aimed at by the Act was agreement between the two classes of employers and workmen upon a minimum rate of wages, either for the whole district, or for subdivisions of the district, or for a special minimum rate for a class of mines within it, and for rules accordingly. Such agreement is to be arrived at through the members of the board as adequately representing the two classes of owners and workmen; and in the absence of such agreement that rate and rules are to be settled by the casting vote of the chairman. I find no provision

1915

REX v. AMPHLETT (JUDGE).

Ridley J.

for the presentation of a case to the board, nor for any hearing by the board of any one not a member of it. It is on the knowledge, sense, and experience of the board that the Act relies for the attainment of its object. It is in accordance with this view that the application of the thin seam owners was put forward by Mr. Crawshaw, while Mr. Smith put forward the views of the men; but neither side suggested that their wishes should be expressed by any other person, or that any one could be there who was not a member of the board, nor that the application should be further considered in any other way than it was. The present rule requires the chairman to do that which the board did not do, and that which appears to me not to be in accordance with the intentions of the Act. Much reliance was placed, in support of the rule, on ss. 3 and 4 of the Act, to which sections I have not yet referred. These are the sections by which the maintenance and variation of the rates and rules constituted by the earlier section are controlled. [He read the sections.] It was argued that these provisions made it necessary for the joint district board to hear and determine this application in some way different from that which they have adopted, and that therefore the chairman must, on their failure to do so, hear on his part such application in a similar way; in other words, that neither the board nor the chairman have heard the application at all. I assume that this application was made in accordance with the provisions of the Act; that it represented a considerable body of opinion amongst the employers, and that it entailed a variation of the minimum rate of wages within the meaning of s. 3, sub-s. 2, and further that no objection in respect of time could be made to its validity. But it appears to me that these sections of the Act do not, in respect of the dealing with such an application, distinguish it from the dealing with matters under s. 2. The minimum rate and the rules had to be settled by agreement if possible, if not by the casting vote of the chairman. When settled they were to be maintained; yet by agreement at any time they might be varied; and after the lapse of a year without agreement on an application representing a considerable body of opinion. Without such application they could not be altered unless on agreement. But I find nothing which alters what in

my opinion was the general intention of the Act, and think that the chairman, who had to act in place of the board, was right when in his letter of July 27 he said that if the applicants were not satisfied they must find their remedy in a different representation on the board. For these reasons I think the rule should be discharged, but as my brothers have come to the other conclusion I need hardly say that I must doubt the correctness of this decision. But as this is the opinion at which I have arrived I am bound to express it.

BRAY J. read the following judgment:—In this case the applicants, who are the West Yorkshire Thin Seam Owners Association, ask for a writ of mandamus directed to His Honour Judge Amphlett as chairman of the joint district board for the district of West Yorkshire requiring him to hear and determine an application made by them for an alteration of the minimum rate of wages under s. 3, sub-s. 2 (*b*), of the Coal Mines (Minimum Wage) Act, 1912. Their contention as put before us was (*a*) that there was a good and valid application by them as employers representing a considerable body of opinion amongst the employers concerned within the sub-section; (*b*) that the joint district board had within three weeks after the expiration of the notice of the application failed to deal with the application; (*c*) that consequently it fell on the chairman to deal with the application, and that he, after request failed or refused to deal with or determine the application. The contentions of the Solicitor-General, who appeared for the chairman, and Mr. Gordon Hewart, who appeared for the workmen members of the board and for Mr. Wadworth, the workmen's secretary of the board, and of Mr. Henn Collins, who appeared for the employer members and their secretary Mr. Day, were as follows: (1.) That there was no application and no proper notice of such an application; (2.) That the district board heard and dealt with the application and referred it to the chairman, and that the chairman dealt with it under s. 2, sub-s. 2; (3.) That if the applicants were not heard they had no right to be heard before the district board except through the employers' representatives on the board. The last point was stated by the Solicitor-General to be the point of

1915

REX v. AMPHLETT (JUDGE).

Bray J.

substance; and it is a point of considerable importance as affecting both workmen and employers. In order to deal with the contentions it is necessary to see what was the object of the Act, and the scheme provided for effecting that object. The object of the Act was to provide a minimum wage for workmen employed underground in coal mines. The scheme was to provide a mode of arriving at a minimum wage and so avoiding a strike. Sect. 1 provided that in every contract for the employment of such a workman there was to be an implied term that the employer would pay to the workman wages at not less than the minimum rate, unless under the district rules the workman was a person excluded, or had forfeited his right to such wages by reason of his failure to comply with conditions laid down by the rules. It then provided that the district rules should be rules made by the joint district board under the powers of the Act. Sect. 2 provided for the settlement of minimum rates of wages and district rules. Sub-s. 2 of the section provided for the constitution of the joint district board. It was to consist of persons who in the opinion of the Board of Trade adequately represented the workmen and the employers, and the chairman was to be an independent person appointed by agreement between the representatives of the workmen and employers, or in default by the Board of Trade, and there was to be a rule for providing equality of voting between the representatives of the workmen and the employers, and for giving the chairman a casting vote in the case of difference between the two classes of members. By sub-s. 3 the joint district board were to settle the general minimum rates and the general district rules which should be applicable to all workmen employed in the mines other than mines to which a special minimum rate or special district rules were made applicable. By sub-s. 4 the joint district board are given power to settle a special minimum rate or special district rules for a group or class of mines. By sub-s. 5 the board are empowered to divide their district into two parts, or in cases of agreement, into more than two parts. Sect. 3, sub-s. 1, provides that the minimum rate of wages and the district rules settled under the previous section should remain in force until varied in accordance with the provisions of the Act; and sub-s. 2 of this section gives

the board the power to vary the minimum rate or the district rules in two cases and in two only: (*a*) At any time in case of agreement between the members, and (*b*)—and here I give the exact words as much turns upon them—"After one year has elapsed since the rate or rules were last settled or varied, on an application made (with three months' notice given after the expiration of the year) by any workmen or employers, which appears to the joint district board to represent any considerable body of opinion amongst either the workmen or the employers concerned"; and in both (*a*) and (*b*) the provisions of the Act as to settlement of wages or district rules are so far as applicable to apply to variation of the rate or rules. Sect. 4, sub-s. 1, provides for what is to happen in case of failure to appoint a joint district board; and by sub-s. 2, if the board within three weeks after it has been recognized under the Act fails to settle the first minimum rate of wages and district rules, or if within three weeks after the expiration of a notice for an application under the Act to vary the minimum rate of wages or district rules it fails to deal with the application, the chairman of the board shall settle the rates or rules or deal with the application; but power is given to the board by agreement, and to the chairman, to extend the three weeks. The remaining provisions of the Act do not affect the questions raised here. These provisions appear to effectively provide for the settlement of the minimum rate and district rules in the first instance, and for their subsequent variation. It is the provisions for variation that the Court has to deal with here.

The joint district board was duly constituted, and amongst the employers' representatives were several owners of thin seam mines who sought to be specially grouped with a special minimum rate. By an award made by the chairman on June 10, 1912, the minimum rates and district rules were duly settled. He subdivided the district into two parts, the eastern subdivision and the western subdivision, and settled different minimum rates of wages for each, but the applicants' mines were not specially grouped, and had no special minimum rate of wages. In June, 1913, a body called the Yorkshire Miners Association, as representing workmen, gave notice of an application

1915

REX v. AMPHLETT (JUDGE).

Bray J.

under s. 3, sub-s. 2 (*b*), to vary the minimum rate and district rules, and I think, but I am not sure, that there were other applications. These applications, I gather, had not been dealt with up to March 13, 1914, when Messrs. Simpson & Curtis, as solicitors for the applicants, wrote a letter to the chairman which the applicants contended was a valid application or notice of application under the same sub-section. The terms of this letter will be considered by me presently. A copy of the letter was also sent to each of the secretaries representing respectively the workmen members and employer members of the board. This letter was followed up by further correspondence, to some of which I shall have to refer later. On July 6 and 7 the board held a meeting, which was attended by the chairman, and a resolution was passed referring certain questions to the chairman owing to disagreement, with which I shall also have to deal. The applicants contended that at this meeting the board in their absence refused to hear them and failed to deal with their application. The chairman by an award dated July 21 decided the points referred to him. He did not in that award refer to the applicants' application. On July 25 the applicants' solicitors wrote to the chairman, and correspondence followed which the applicants contend amounts to a neglect or refusal by the chairman to deal with their application.

I will now deal with the contentions raised on either side. First, was there an application under s. 3, sub-s. 2 (*b*), with due notice? The first paragraph of the letter of March 13, 1914, was as follows: "Coal Mines (Minimum Wage) Act, 1912. At a meeting of a body representing the class of owners working thin seam mines we were instructed on their behalf to apply to the joint district board under s. 3, sub-s. 2 (*b*), of the above Act, for a variation in the minimum rate of wages applicable to their collieries." They then expressed a desire for an opportunity of laying their case before the joint district board in support of a special minimum rate under the circumstances set forth in s. 2, sub-s. 4, and they also desired a similar opportunity of being formally heard upon the point whether they represented a considerable body of opinion. It was objected that this letter contained no reference to the three months. It would have

been better if it had done so, but I do not think it is bad on that ground. No specified form of notice is required, and it is sufficient, I think, if the notice was such that the recipients ought to construe it as a three months' notice. There is an express reference to the particular part of the sub-section which requires the three months' notice, and by saying that it was a notice under that sub-section I think the applicants were sufficiently indicating that it was a three months' notice. The subsequent correspondence and conduct of the parties showed that this was treated by all parties as a good notice. Next it was said that it was not an application but merely notice of an intention to make an application. I do not think that is a sound objection. If there were any difficulty on the point I think the letter of July 30, when read with the previous correspondence to which reference is made, is a good application, and it was made after the expiration of the three months' notice. It was suggested during the argument by my Lord that s. 3 might have no application to a case where as here the applicants desired to have a special rate for a group of collieries under s. 2, sub-s. 4. If that were so I think it would be fatal to the applicants here, because s. 3, sub-s. 1, provides that the original rates shall remain in force until varied in accordance with the provisions of the Act. The only provision for varying is in s. 3, sub-s. 2. If that does not apply there is no power to vary, and no power to settle a special rate for a group if there was none settled originally. It would be unfortunate if this were so, but in my opinion the words of s. 3, sub-s. 2 (*b*), are quite wide enough. The application for a special rate for a group if no group existed before is an application to vary the minimum rate for that group, and the last words of sub-s. 2 direct that the provisions of the Act, which include s. 2, sub-s. 4, shall apply. The next objection is that the board heard and dealt with the application and referred it to the chairman, in other words, that there was no default on the part of the board under s. 4, sub-s. 2. [He examined the evidence contained in the affidavits and in the shorthand notes of the meetings of the board on July 6 and 7, and came to the conclusion that the board had failed to deal with the application.] The next point involves the important contention

1915

REX v. AMPHLETT (JUDGE).

Bray J.

that the applicants had no right to be heard before the board except through the employers' representatives on the board. It is important to see what the applicants' contention on this point is. It is that when s. 3, sub-s. 2 (*b*), gives them the privilege of making an application it implies that they have a right to present their case. They concede that, if the board choose to say you shall present your case and arguments in writing and not appear personally before them, the board may do so; but this is not what the board did. The applicants applied in terms to be heard. The board gave no answer. No notice was given to them that their application would come before the board on July 6 or 7, nor that they could not be heard. I agree that the hearing before the board is not a judicial proceeding. The board are acting as an administrative body, not as a judicial body. I think nevertheless that their duty was to do as stated by Lord Loreburn L.C. in *Board of Education* v. *Rice*. (1) He says, "In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial." In *Local Government Board* v. *Arlidge* (2) Lord Moulton says, at p. 146: "There is no doubt it must act in a judicial temper." In my opinion the applicants had a right to present their case and to have that case considered. They never had that opportunity. Then it is said that they had representatives on the board, and that these representatives might have presented the case. But the application under s. 3, sub-s. 2 (*b*), is not the application of the employers' representatives on the board. The section contemplates that there may be persons not members of the board who desire to make an application. It is "*any* workmen or employers," whosoever they may be, who appear to represent a considerable body of opinion, whether it be a trade union, or a mine-owners' association, or members of no such body. There is nothing in the sub-section to indicate that they must, and can only, be represented by members of the board. They are given

(1) [1911] A. C. 179. (2) [1915] A. C. 120.

the privilege of making the application, which in my opinion gives them at least the privilege of presenting their case. In my opinion the contention of the Solicitor-General and those who showed cause against the rule is not sound. I have dealt with it at some length as being the point of substance, but if it be the fact that the board failed to deal with the application, I am not sure that it is necessary to decide it. I wish to make clear what my decision is. It is that the applicants had a right to present their case, but not in any particular way. The board may regulate their own procedure, provided it gives those making such an application a right to present fairly their case and arguments in support, not necessarily orally, and that it is no answer to say that they have representatives on the board. The next point is, supposing that the board have failed to deal with the application, has the chairman dealt with it? If he has that would be a good answer to the present application. In my opinion he has not dealt with it. I think this is sufficiently shown by his letters of July 27 and August 1. He says in terms that s. 2, sub-s. 4, has no application, and that the course suggested, that is to say for him to deal with the application, would be ultra vires. In my opinion the rule should be made absolute.

ATKIN J. read the following judgment:—The questions raised upon the argument of this rule appear to me to be of great importance both to employers and workmen engaged in coal mining. The Coal Mines (Minimum Wage) Act, 1912, as is well known from the circumstances in which it was passed, and as can be gathered from its provisions, was passed with the object of promoting industrial peace. It provides for a joint board of employers and workmen under an independent chairman, whose function it is from time to time to fix minimum rates of wages for miners and rules under which those wages are to be adjusted. The conditions affecting both wages and rules are liable to change, and it is obvious that unless reasonable facilities are given for adapting the rates and rules to any serious change of circumstances either on the part of the workmen or the employers the Act is likely to bring not peace but a sword.

1915

REX v. AMPHLETT (JUDGE).

Atkin J.

Accordingly provisions for alteration are made in s. 3. It was argued in showing cause against the rule that an application to vary rates or rules, though representing a considerable body of opinion amongst the workmen or employers, could not be entertained by the board unless presented by a member of the board. It appears to me that such a contention does violence to the words of sub-s. 2 (*b*), which contemplates an application to the board by someone outside the board, and would defeat the object of the section. No doubt the employers and workmen on a board are representative generally of the respective entirety of employers or workmen, but it may well happen in a large industry that there may be a considerable body of opinion amongst either workmen or employers which either may not coincide with the opinion of any particular representative on the board, or which the respective representatives may at any time consider it inconvenient or embarrassing to existing proposals to put forward. On the contention against the rule an application under such circumstances could not be entertained at all. Any such views of their own the representatives may possibly give effect to after considering the application; but to my mind they afford no reason at all for not allowing the application to be considered. It was said that the remedy was to apply to the Board of Trade to place some representatives of the applicants on the joint board. A more inconvenient mode of constituting a board than to put permanently on the board every applicant who holds a view on a particular question not at the time favoured by any existing member of the board it is difficult to conceive. I think it essential to the effective working of the Act that where there is a substantial body of opinion amongst employers or workmen, especially workmen desirous of pointing out hardships in rates or rules, there should be reasonable facilities of putting those views before the board; and that those facilities are denied if it is held to be a condition that the workmen or employers must first find an existing member of the board to put forward the application for changes. How the application should be made and supported it appears to me is for the board to decide as a matter of its own procedure. I do not think that there is necessarily a right on the part of the applicant to be

heard in person, and I entirely accept the view that the board in dealing with the application is acting in an administrative capacity. On the main question it appears to me plain, after reading the affidavits and the shorthand notes of the proceedings of the joint district board, that the application in question was not dealt with by the board. The position of the applicants was only incidentally referred to by one or two of the speakers in debating a specific proposal before the meeting to do away with the two subdivisions of the district. If this is so the application, subject to the question of time, had to be dealt with by the chairman; and there was really no controversy before us but that he had not dealt with it. I think it clear from his letter of August 1, 1914, that he declined to consider it on the ground that he had no jurisdiction; and on this point I think that he overlooked the provisions of s. 4, sub-s. 2. On the question of time I have felt some difficulty, but I agree with the judgment of my brother Bray. I think that in administrative matters of this importance it would be unfortunate to give effect to technical objections as to time unless the Court was clearly compelled to do so. I am of opinion that the only effect of the section as to time is that the board are not obliged to deal with an application to vary until three months after notice of it is given; and that, unless they have dealt with it in three weeks after the lapse of the three months, or such further extended specified time as is mentioned in the proviso to s. 4, sub-s. 2, the duty is then imposed upon the chairman to deal with it. I think that the rule must be made absolute. The chairman may settle his own procedure as he thinks fit, provided he gives the applicants a reasonable opportunity of presenting their case.

Rule absolute.

Solicitor for chairman: *Solicitor for Board of Trade.*

Solicitors for workmen's section: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

Solicitor for employers' section: *Vincent & Vincent, for Day & Yewdale, Leeds.*

Solicitors for applicants: *Peter Thomas & Co., for Simpson & Curtis, Leeds.*

J. F. C.

C. A.
1915
Feb. 11, 24.

[IN THE COURT OF APPEAL.]

PROCTER AND ANOTHER *v.* TARRY AND ANOTHER.

Licensed Premises—Lease—Increase of Licence Duty—Increased Rent due to Licence—Proportion of Increase in Duty recoverable from Lessor—Finance Act, 1912 (2 & 3 *Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that in the case of licensed premises which are not "tied," and which are held under a lease made before the Finance (1909-10) Act, 1910, the lessee shall be entitled to recover from the grantor of the lease so much of the increase in licence duty payable under the Act of 1910 as is "proportionate to any increased rent . . . . payable in respect of the premises being let as licensed premises":—

Held, that, in order to ascertain for the purposes of the above section whether any increased rent was payable in respect of premises being let as licensed premises, the question to be considered was what rent a tenant would have given at the date of the lease for a lease of the same premises unlicensed, for the same term and subject to the same covenants and conditions except in so far as these were inapplicable to unlicensed premises, and that it was not material to inquire what rent might be obtained for the premises without a licence if they were not subject to a lease and if as a result of extensive structural alterations and additions the licensed premises were converted into premises of a totally different character for the purpose of putting them to a use most profitable to the owner.

Judgment of the Divisional Court [1914] 2 K. B. 178 affirmed.

APPEAL from the decision of a Divisional Court (Ridley and Rowlatt JJ.) affirming the judgment of the county court of Warwickshire holden at Warwick; reported [1914] 2 K. B. 178.

The plaintiffs were the lessees of fully licensed premises known as the Bath Hotel at Leamington, which was a small old-fashioned hotel with a bowling green adjoining, under an indenture of lease dated March 25, 1907, for a term of fourteen years from that date. The defendants were the executors of the lessor and were entitled to receive the rent. The lease did not contain any covenant, agreement, or undertaking on the part of the lessees to obtain a supply of intoxicating liquor from the grantor of the lease. The annual rent reserved by the lease was 390*l.* Before the passing of the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), the duty payable in respect of the licence of the Bath Hotel

was 45*l.* per annum. Since the passing of that Act the duty had been increased to 166*l.* per annum.

The plaintiffs claimed under s. 2 of the Finance Act, 1912 (1), to recover 46*l.* 10*s.* 9*d.*, as being so much of the increase of the duty payable in respect of the licence as was proportionate to the increased rent payable in respect of the premises being let as licensed premises.

Evidence was given on behalf of the plaintiffs, and the county court judge found as a fact, that the premises as they stood could, if unlicensed, be let as a private hotel or boarding-house for 240*l.* a year; and the plaintiffs' contention was put in the form of a rule of three sum as follows: As 390*l.* (the rent reserved by the lease) is to 150*l.* (the difference between 390*l.* and 240*l.*) so is 121*l.* (the difference between 45*l.* and 166*l.*) to 46*l.* 10*s.* 9*d.*, the sum which the plaintiffs claimed to recover.

The defendants contended that no increased rent was payable in respect of the premises being let as licensed premises, and in support of this contention they adduced evidence to prove that if a sum of about 2750*l.* was expended in converting the hotel into shops and in building shops upon that part of the premises which was used as a bowling green, after allowing 5 per cent. per annum for interest on the capital expenditure, a net annual rental of over 500*l.* could be obtained from the shops.

(1) Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2: "Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of court by a county court in England or Ireland, and by a sheriff court in Scotland.

"The words 'lease,' 'leased,' 'agreement for lease,' and 'lessee' in this section include sub-lease, sub-leased, agreement for sub-lease, and sub-lessee, respectively."

C. A. 1915

PROCTER v. TARRY.

The county court judge, without finding as a fact whether the defendants' allegations had been proved, held that under s. 2 he had not to determine what the annual value of the premises might be if dealt with in the manner suggested by the defendants, but that the material question was, what was the difference between the rent payable under the lease in respect of the premises and the rent which those same premises would command if the licence was taken away? He accordingly excluded the above-mentioned evidence given on behalf of the defendants from his consideration, and gave judgment for the plaintiffs for 45*l.*

The Divisional Court affirmed the judgment. (1)

The defendants by leave appealed.

Disney, for the defendants. In the case of "tied" houses s. 46 of the Finance (1909-10) Act, 1910, gave relief to the licence-holder in respect of the increase of the licence duty payable under that Act. There was no similar provision in that Act in the case of "free" houses. Sect. 2 of the Finance Act, 1912, for the first time gave relief to the licence-holder in the case of a "free" house. Under the latter section the licence-holder can recover from the grantor of the lease "so much of any increase of the duty payable in respect of the licence under the Finance (1909-10) Act, 1910," as is "proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises." In order to ascertain that sum the rent of the premises without a licence must be estimated. The word "premises" in relation to the annual value of licensed premises is defined in s. 4 of the Finance Act, 1911 (1 & 2 Geo. 5, c. 48), as including "any offices, courts, yards, and gardens which are occupied together with and are within the curtilage, or in the immediate vicinity, of the house or place where the liquor is sold." That definition applies to the Finance Act, 1912, because that Act, by s. 13, so far as it relates to duties of excise, is to be construed together with the Acts which relate to the duties of excise, including therefore the Act of 1911. "Premises" has a wider meaning than building, and therefore the

(1) [1914] 2 K. B. 178.

expression "licensed premises" in s. 4 of the Act of 1912 includes the bowling green. In order to ascertain what rent would be obtainable for the premises without a licence it must be assumed that the owner is allowed to deal with them in such a way as to make them most profitable to himself regardless of the existing lease. The evidence adduced on behalf of the defendants showed that the owner, by the expenditure of a sum of money, could build shops upon the premises and so make them capable of yielding, after allowing interest on capital expenditure, a higher rental than was payable by the plaintiffs. The premises must be considered as if they were in hand, and as if the owner were entitled to make the best use of them. The existing lease must be ignored. It is admitted that some structural alterations would be necessary to enable the premises, if unlicensed, to command a rent. If so, where can the line be drawn? All reasonable expenditure necessary to enable the premises, if unlicensed, to command the best rent must be taken into account. "Rent" in s. 2 of the Finance Act, 1912, has the same meaning as "annual value" in the Licensing and Finance Acts, and in *Ashby's Cobham Brewery Co.'s Case* (1) Kennedy J. adopted as correct the language of Sir Henry Primrose, the chairman of the Board of Inland Revenue, in his memorandum explaining the principles upon which the Commissioners of Inland Revenue proceeded in determining the amounts of compensation payable on non-renewal of licences. The memorandum is set out in full in the report of the case in the *Law Times* (2), and at p. 264, dealing with the value of the premises without a licence, it says "allowance being made for cost of alterations necessary to fit the premises for earning the annual value as estimated." So, too, in *Inland Revenue Commissioners* v. *Truman, Hanbury, Buxton & Co.* (3), which dealt with the annual licence value of licensed premises for the purposes of s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910, Lord Atkinson (at p. 673) said that the value of premises if unlicensed is to be ascertained "by estimating what the hypothetical tenant would give to possess and enjoy them with all their capacities and possibilities in their unlicensed

(1) [1906] 2 K. B. 754, at p. 761. (2) 95 L. T. 260, at pp. 263—265.
(3) [1913] A. C. 650.

C. A. 1915

PROCTER v. TARRY.

state, including in that their fitness for carrying on in them a trade other than the trade in intoxicants." Lord Parker (at pp. 675, 676) said that the annual value of the premises without a licence is "a market rental value ascertained in the usual way without reference to any particular mode in which the premises are to be used, but with reference, of course, to all the various purposes for which the premises are available." Here the premises, that is, the hotel and bowling green, are available for conversion into shops. The county court judge was therefore wrong in excluding from his consideration the evidence adduced by the defendants.

Wootten, for the plaintiffs. The question under s. 2 of the Finance Act, 1912, is what is the "increased rent payable in respect of the premises being let as licensed premises." The question, therefore, is how much of the rent is attributable to the licence. No assistance is derived from citing decisions upon other words in other statutes. The rent of "the premises" licensed must be compared with the rent of the premises unlicensed, and the date for comparison is that of the granting of the lease. As Rowlatt J. said (1), "the rent reserved by the lease must be analysed so as to show how much of it is due to the premises without a licence and how much is due to the existence of the licence." The premises compared must be the same premises. It would be futile to compare different premises. The premises mean the premises as demised. The rent of the premises unlicensed is to be ascertained by the rent which a tenant would have been willing to pay for a lease of the premises for the same term and subject to the same covenants and conditions except in so far as they are only applicable to licensed premises; and allowance must be made for the expense of alterations, not being substantial structural alterations which would destroy the identity of the premises, necessary to make them fit to be occupied as unlicensed premises. The difference between the rent of the premises licensed and the rent as unlicensed must be ascertained. It is not permissible to take the site as if it were in the possession of the owner and estimate what would be the most profitable use to which he could put it.

(1) [1914] 2 K. B. at p. 182.

The evidence given on behalf of the defendants before the county court judge was rightly rejected, as it did not deal with the demised premises, but with purely hypothetical and speculative premises. If it is permissible to refer to other decisions upon other statutes, in *Inland Revenue Commissioners* v. *Truman, Hanbury, Buxton & Co.* (1), Lord Moulton clearly considered that the premises to be compared, for the purpose of ascertaining the annual licence value under s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910, must be the same premises. The decisions of the county court judge and of the Divisional Court were therefore right.

Disney in reply.

Cur. adv. vult.

Feb. 24. LORD READING C.J. read the following judgment :— This appeal raises a question of some difficulty upon the construction of s. 2 of the Finance Act, 1912.

In 1907 a lease was granted to the plaintiffs of the fully-licensed premises known as the Bath Hotel, at Leamington, for a term of fourteen years. The annual rent reserved by the lease was 390*l.* The premises consisted of the hotel buildings and a bowling green adjoining. When the lease was granted the premises were, under the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), subject to a licence duty of 45*l.* per annum. By the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), the licence duty was raised to "half the annual value" of the premises, which in this case meant an increase from 45*l.* per annum to 166*l.*, a difference of 121*l.* The whole of the licence duty is primarily payable by the licence-holder. In the case of "tied" houses part of the increased duty is recoverable by the licence-holder under the Finance (1909-10) Act, 1910, but no provision was made in that statute for the recovery of any part of the duty by the licence-holder of a "free" house. By the Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2, the lessee of a free house is entitled to recover from the grantor of the lease "so much of any increase of the duty payable in respect of the licence" as is "proportionate to any increased rent or premium payable in respect of the premises being let as

(1) [1913] A. C. at p. 668.

C. A. 1915

PROCTER v. TARRY.

Lord Reading C.J.

licensed premises." Apparently this section was passed for the purpose of affording relief to the lessee of a "free" house upon whom the obligation to pay the whole of the increased licence duty had been imposed by Parliament. In the present case the plaintiffs, the lessees, sued the defendants, who were the executors of the grantor of the lease, in the county court to recover a sum of 46*l.* 10*s.* 9*d.*, this sum, according to their contention, representing the amount they were entitled to recover from the grantor of the lease in accordance with the provisions of s. 2 of the Finance Act, 1912. The county court judge gave judgment in favour of the lessees for 45*l.* The Divisional Court affirmed the judgment, and the appeal to this Court is brought by their leave.

The county court judge based his judgment on his finding of fact that the premises as they stood, that is, the hotel buildings and the bowling alley, could, if let unlicensed, be let as a temperance hotel or a boarding-house at 240*l.* a year. He then proceeded to ascertain the amount recoverable by the following rule of three sum: As 390*l.* (the rent under the lease) is to 150*l.* (the difference between 390*l.* and the 240*l.* above mentioned) so is 121*l.* (the difference between 45*l.* licence duty under the Inland Revenue Act, 1880, and 166*l.*, the licence duty under the Finance (1909-10) Act, 1910) to the sum recoverable, that is, approximately 45*l.*

The defendants contend that the judgment should be reversed and judgment entered for them on the ground that the judge wrongly excluded from his consideration evidence given on their behalf that the premises let as unlicensed premises would produce 500*l.* per annum, and that therefore, as no increased rent was payable in respect of the premises being let as licensed premises, the plaintiffs were not entitled to recover any sum from them. The evidence in question was to the effect that thirteen shops could be built upon the premises, that is, the hotel buildings and the bowling alley. The hotel itself could be transformed into three shops, one shop could be erected upon the vaults, and nine lock-up shops upon the bowling alley. To erect the thirteen shops would involve a capital expenditure of 2750*l.* These would bring in a net annual rental of 675*l.*, and, deducting interest at 5 per cent. per annum, that is, 137*l.* 10*s.*, they would produce

over 500*l.* per annum as the rent for the premises if let without a licence. Objection was raised by the plaintiffs' counsel to the admissibility of this evidence. The county court judge admitted it de bene esse, but eventually rejected it, not because he disbelieved it, but because he was of opinion that he must direct himself, as a matter of law, to exclude it from his consideration in arriving at his findings of fact.

The question for this Court is whether the learned county court judge's view is right, and that depends upon the true interpretation of the language of the section under discussion. In order to determine its true effect and meaning it is necessary, in my judgment, to confine one's attention closely to the words of the statute. No assistance is to be derived from reference to the provisions of other statutes couched in different language with regard to compensation value, monopoly value, or even annual value of tied houses, or to reported decisions upon those statutes. The problem is to find the amount of increased rent, if any, payable in respect of the premises being let as licensed premises. The section presupposes a lease or an agreement for lease made before the passing of the Finance (1909-10) Act, 1910, and only applies when the licensed premises are so held. To ascertain the increased rent it is necessary to compare the annual rent which could be obtained for the same premises if let without a licence with the rent reserved under the lease for the premises licensed. The rent of the premises unlicensed is to be ascertained by estimating the amount which would be paid by the hypothetical lessee to enjoy the premises with all their capacities, advantages and possibilities without a licence, that is, to find the rent which would be paid for the premises for use in any trade or for any purpose which does not involve the right of selling intoxicating liquor on the premises. Generally the licence attached to the premises enhances their value, but not necessarily so; whether it does or not must depend mainly upon the situation and character of the premises. In this case the question is what is meant, in the words "in respect of the premises being let as licensed premises," by "premises." The plaintiffs contend that the expression as used in the statute means the buildings and does not include the bowling alley. The

C. A. 1915

PROCTER v. TARRY.

Lord Reading C.J.

defendants contend that it includes not only the buildings but also the bowling alley. I think the defendants are right in this respect. By s. 4 of the Finance Act, 1911 (1 & 2 Geo. 5, c. 48), with which the Finance Act, 1912, is to be construed (see s. 13 of this statute), the expression includes "any . . . . yards and gardens which are occupied together with and are within the curtilage," and the bowling alley is therefore part of the premises for this purpose. The defendants next assume, in order to arrive at the hypothetical rent, that the hotel buildings are converted into shops and that the bowling alley is covered by shops erected upon it. The plaintiffs contend that for this purpose the premises must be taken as they stand, and not as they would stand if they were now turned to the most profitable use and advantage by a freeholder or by a lessee with a long unexpired term. In my judgment the comparison of the rent reserved by the lease for the licensed premises with the rent obtainable for the premises unlicensed must be a comparison of the same premises, that is, the premises as they were when let under the lease for the same term of years and with the same covenants and conditions, except in so far as these are inapplicable to unlicensed premises. The section, as I have already said, applies only to premises let under a lease or agreement for lease, and the words "increased rent in respect of the premises being let as licensed premises" mean, according to my view, the increase in the rent which was obtained at the time of granting the lease for the premises by reason of their having been let under a lease as premises with a licence. To ascertain that increased rent the comparison, in my opinion, cannot be with the premises unlicensed upon the assumption that they are altered regardless of the term of the lease or its covenants and conditions so as to arrive at the most profitable use to which the premises could be adapted by the freeholder or lessee under a lease for a long term. I think the evidence was therefore rightly excluded.

It was further said by the defendants that the comparison can never be of the premises as they stood for the reason that alterations must be made and some outlay must necessarily be involved in adapting the premises for the uses to which it is assumed they will be put by the hypothetical lessee. In support

of this contention reference was made at the Bar to the memorandum of Sir Henry Primrose incorporated in the judgment of Kennedy J. in *Ashby's Cobham Brewery Co.'s Case*. (1) The words relied upon are, "allowance being made for cost of alterations necessary to fit the premises for earning the annual value as estimated." I cannot see that any difficulty is created by making this allowance. Of course there must be in almost every case, if not indeed in all cases, some alteration made in the premises when they are to be adapted for other uses, and alterations involve expenditure. But this capital outlay should be and is taken into account by experts when arriving at the annual rent which would be paid by the hypothetical tenant. If he would be willing to give 250*l.* for these premises assuming that the alterations had been made, he would give a proportionately less amount if in fact he had first to expend the necessary capital in making the alterations, and that less amount would represent the annual rent obtainable for the premises unlicensed.

I am of opinion that this appeal should be dismissed.

SWINFEN EADY L.J. read the following judgment:—The plaintiffs' claim is founded upon s. 2 of the Finance Act, 1912, and the question raised by this appeal relates to the basis upon which the annual value of the premises as unlicensed is to be ascertained, in order to determine the amount of the increase in rent by reason of the premises being let as licensed premises. The difference between the annual value of the premises as unlicensed and the rent reserved by the lease is the increased rent attributable to the licence. In arriving at the annual value by estimating the annual rent which the hypothetical tenant would be prepared to pay (see *Inland Revenue Commissioners* v. *Truman, Hanbury, Buxton & Co.* (2)) regard must be had to the length of the term, the liability for repairs, and the other provisions of the lease, except any provisions relating to the user of the premises as licensed premises. The question to be answered is, What annual rent would a tenant have been willing to pay at the date of the lease for the same premises for the like term,

(1) 95 L. T. 260, at p. 264. (2) [1913] A. C. 650.

C. A. 1915

PROCTER v. TARRY.

Swinfen Eady L.J.

with liberty to use them for any other suitable and available purpose than as licensed premises? A tenant in the ordinary course of business would be willing to expend moneys in alterations, if thereby he could ensure recouping his expenditure during the term with some advantage to himself. Thus, if in the present case it could have been shown that the premises if used for any particular trade and as adapted for that trade would have been worth say 320*l.* a year, and that the expenditure upon alterations to adapt them for that trade would have been recouped with interest by retaining 20*l.* a year during the term, and that a tenant could probably have been obtained willing to take the premises for the purposes of such trade, and to pay say 300*l.* a year and make the expenditure in the alterations, such evidence would have been admissible to establish that the annual value of the premises, if unlicensed, would have been 300*l.*, and that the increased rent payable in respect of the premises being let as licensed premises did not exceed 90*l.*

In the present case, however, the evidence tendered by the defendants had not any reference to the rent which might have been obtained for the demised premises if unlicensed; it was directed to show what annual rent the landlord could have obtained if he had expended money in structural alterations and in building upon the bowling green. But if the buildings and premises were improved by the landlord's expenditure of money the rent obtained for the premises so improved would not have been the rent for the same premises as the demised premises unlicensed. The evidence, in my opinion, was properly rejected by the county court judge, and the appeal fails.

BRAY J. read the following judgment:—In this case the plaintiffs, the lessees of certain licensed premises, sought to recover the sum of 46*l.* 10*s.* 9*d.* as the proportion of the licence duty payable to them by the defendants (the executors of their lessor) under the Finance Act, 1912, s. 2. The learned county court judge gave judgment for the plaintiffs for 45*l.*, and the defendants appeal against the decision of the Divisional Court affirming that judgment. The defendants allege that the county court judge wholly ignored certain evidence adduced by them.

I think it is clear that he did ignore it, not because he disbelieved it, but because he thought it had no bearing upon the matter before him, and the question we have to consider is whether he was right. If he was wrong, I think he misdirected himself on a matter of law. Now under the section the judge had to do a rule of three sum, and one of the three figures was the increased rent payable by the plaintiffs in respect of the premises being let as licensed premises. The evidence was evidence that the owner of the premises by the expenditure of 2750*l.* could have let them at a rent of 665*l.*, a sum which, after allowing for interest on the expenditure, would have given him a net rent of 525*l.*, a sum well in excess of the existing rent of 390*l.*, in which case there would be no increased rent and no proportion of the duty would be recoverable by the plaintiffs. Was that evidence relevant? Was it material to inquire what rent the owner could have obtained by large expenditure on the premises by him? In order to determine this question it is necessary for us to construe this most difficult section of the Finance Act. The material words are "any increased rent or premium payable in respect of the premises being let as licensed premises." First, what is "increased rent"? Increased beyond what? I think it is fairly clear that it is beyond the rent payable in respect of the premises being let as they stood as unlicensed premises at the date of the lease, or in other words what a tenant might be expected to give for those premises. I say "as they stood" because the statute says "the premises," which means the premises let under the existing lease. It cannot mean altered premises or improved premises, and I say at the date of the lease because it is dealing with the rent payable under the lease, and the rent payable under the lease was fixed then under the circumstances then existing. You must compare like with like. "The premises," according to s. 4 of the Finance Act, 1911, means the whole of the premises and includes the whole of the buildings, and the hypothetical lease in order to compare like with like must be a lease which (apart from covenants or conditions having reference to the premises being let as licensed premises) is a lease on the same conditions and for the same term as the existing lease. The lease here is for fourteen years, and the

C. A. 1915

PROCTER v. TARRY.

Bray J.

hypothetical lease must be for the same period. It would be wrong to look at the rent which a yearly tenant would give, or the rent which a lessee would give for a sufficiently long term to justify him in expending a large sum. We have not to consider what is the value of the premises to the owner or what rent or profit he might get by a large expenditure. It is what rent a tenant would have given on a fourteen years' lease for the premises as they stood. If this be the right construction the county court judge was clearly right. The evidence he ignored was not evidence as to what a tenant would give for the premises as they stood. Nobody said or could say that a tenant on a fourteen years' lease would expend 2750*l.*

I might leave the case here, but there was much argument as to whether it was permissible to take into consideration the fact, if it were a fact, that alterations could be made in the premises which would greatly increase their value, and if so what might be the extent or nature of such alterations, and I therefore propose to deal with this, especially as I think its consideration will support the construction which I have put on the section. In my opinion, if there were evidence that a tenant would give a higher rent because at a comparatively small expenditure he could make the premises much more valuable, that evidence would have to be considered, and if believed the judge should take the higher rent. In order to make my meaning clear, I take these premises the rent for which unlicensed the judge has found to be 240*l.* If there were evidence that there was a large demand for shops in this position, and that a tenant by expending say 200*l.* or even a larger sum in turning the ground floor into shops could make the premises worth to him 300*l.* a year instead of 240*l.*, and that in consequence he would be willing to give say 275*l.* rent for them on a fourteen years' lease, I think such evidence would be admissible, and if believed the unlicensed rent should be 275*l.*, not 240*l.* The element of value to a tenant because by adapting them for another purpose he can greatly increase their value must always be considered when you are seeking to arrive at the rental value of premises; and it matters not what may be the nature or extent of the alterations provided they only involve such an expenditure as a prudent

tenant would be likely to incur, and the longer the lease the greater would be the expenditure it might be prudent for him to incur. A tenant about to take licensed premises might give or have given a larger rent on the same grounds. It was suggested to us that the alterations must be such as not to destroy the identity of the premises, or not structural or substantial alterations. I do not think such a limitation would be satisfactory, and I can find nothing in the words of the statute to justify such a limitation. What alterations would destroy the identity of the premises? Would turning the ground floor into shops destroy their identity? Would using the bowling green as a nursery garden and covering it with greenhouses destroy its identity? Who could say? On the other hand, if the alterations be limited by their cost and what cost a tenant on a fourteen years' lease could prudently incur, then it is a matter on which a surveyor acquainted with the neighbourhood should be able to give a clear opinion and as to what increased rental the tenant would give in consequence. In truth the whole question becomes one of fact when it has once been decided that the rent is to be such a sum as a tenant might be expected to give for the premises as they stand, and that you cannot inquire what alterations the owner would be likely to make. In my opinion the county court judge was right and the Divisional Court also, though I do not accept the whole of their reasons.

Appeal dismissed.

Solicitors for plaintiffs: *Rawle, Johnstone & Co., for Wright, Hassall & Co., Leamington.*

Solicitors for defendants: *Warren, Murton & Miller, for Lamb & Stringer, Kettering.*

W. F. B.

C. A.
1914
Dec. 14, 15.

[IN THE COURT OF APPEAL.]

BARWELL *v.* ABERCARN BLACK VEIN STEAM COAL COMPANY, LIMITED.

Mine—Coal Mine—Minimum Wage—Dispute—Reference to Umpire under District Rules—Certificate—Condition Precedent to Right to sue—Coal Mines (Minimum Wage) Act, 1912 (2 *Geo.* 5, *c.* 2), *ss.* 1, 2.

The plaintiff, who was a miner employed at the defendants' colliery, brought an action in the county court under s. 1 of the Coal Mines (Minimum Wage) Act, 1912, to recover the difference between the minimum rate of wages settled under the Act and the amount actually earned by him during a certain period. The defendants delivered a special defence that the dispute between the parties (not stating what it was) had been referred to an umpire in pursuance of the district rules, and the umpire had certified in writing that the plaintiff was not entitled to the sum claimed. At the trial the plaintiff gave evidence that he was a miner employed at the colliery during the period in question, and upon his counsel admitting that the dispute (not stating what it was) had been properly submitted to the umpire under the district rules and that he could not put in the certificate of the umpire, the county court judge, upon the authority of *Randle* v. *Clay Cross Co.* [1913] 3 K. B. 795, which decided that it was a condition precedent to the miner's right to sue that he should have obtained a certificate that he was a workman to whom the minimum rate of wages was applicable, gave judgment for the defendants:—

Held, that the production of the certificate by the plaintiff was not a condition precedent to his right to sue, and that the action must be remitted to the county court for further hearing.

Randle v. *Clay Cross Co.* [1913] 3 K. B. 795 overruled upon this point.

Appeal from the decision of a Divisional Court affirming the judgment of the county court of Monmouthshire holden at Newport.

The plaintiff, who was a miner employed by the defendants at their colliery in the South Wales and Monmouthshire district, brought an action in the Newport County Court to recover 11*s.* 3*d.*, as being the balance of wages due to him for the week ending April 27, 1912. The 11*s.* 3*d.* was the difference between the amount of wages actually earned by him for that week and the minimum rate of wages settled under the Coal Mines (Minimum Wage) Act, 1912.

The defendants delivered the following special defence:—"Take notice that the defendants intend at the hearing of this action to rely upon the following grounds of defence:—That the matter in dispute between the parties in this action was referred to Louis H. Hornby, Esq., in pursuance of the district rules for the district of South Wales and Monmouthshire made in pursuance of the Coal Mines (Minimum Wage) Act, 1912, and the said Louis H. Hornby, Esq., certified in writing on the 22nd day of January, 1913, that the plaintiff was not entitled to the amount claimed."

At the trial before the county court judge the following took place (so far as material) as stated in the judge's notes. The plaintiff's counsel in opening the case referred to the Coal Mines (Minimum Wage) Act, 1912, and to the award of Lord St. Aldwyn, dated July 5, 1912, as chairman of the joint district board under the Act, settling the district rules and minimum rates of wages for the district of South Wales, including Monmouth, and particularly to rule 8. The note then stated "admitted properly submitted to umpire under rule 8 (*b*)," and *Randle* v. *Clay Cross Co.* (1) was referred to. The plaintiff was then called as a witness, and stated that after the general strike of miners which began at the end of February, 1912, he restarted work at the colliery on April 22; that the pay was weekly; and that he worked five days in the first week ending on April 27, and his net wages, after paying 16*s.* 8*d.* to a boy, were 1*l.* 3*s.* 1*d.*, which was 11*s.* 3*d.* less than the minimum settled under the Act. The note then went on: "Mr. James"—the plaintiff's counsel—"admitting that he cannot put in certificate of umpire in support of plaintiff's case and admitting *Randle's Case* (1) fatal to him in this Court, and Mr. Prosser"—the defendants' counsel—"submitting the defendants are entitled to judgment on that ground, judgment for defendants with costs on scale C. Leave to appeal."

Rule 8 of the district rules was as follows: "Should any question arise as to whether any particular workman employed underground is a workman to whom the minimum rate is to apply, or whether a workman has failed to comply with any of

(1) [1913] 3 K. B. 795.

C. A. 1914

BARWELL v. ABERCARN BLACK VEIN STEAM COAL COMPANY, LIMITED.

the conditions contained in these rules, or whether by non-compliance with any of these rules such workman has forfeited his right to the minimum rate, such question shall be decided in the following manner:—

(*a*) By agreement between the workman concerned and the official in charge of the mine.

"Failing agreement, by two officials of the colliery representing the employers on the one side and two members of the committee of the local lodge of the Workmen's Federation (or not more than two representatives appointed by them) on the other side.

"Again failing agreement, by the manager of the mine and the district miners' agent.

"(*b*) Still failing agreement, by an umpire to be selected by them (or if they disagree in the selection, by lot) without delay, from one of the panels constituted as hereinafter provided."

By rule 9 a certificate in writing of any decision by any person or persons under rule 8 shall be given by such person or persons to both or either of the parties when requested, and such certificate shall be conclusive evidence of the decision.

In the Divisional Court (Ridley and Bankes JJ.) it was admitted that *Randle* v. *Clay Cross Co.* (1) applied, and that the production of a certificate of the umpire was a condition precedent to the plaintiff's right to maintain the action. The judgment of the county court judge was therefore affirmed. The plaintiff by leave appealed.

F. A. Greer, K.C., and *A. Parsons*, K.C. (*A. T. James* with them), for the plaintiff. It is not a condition precedent to the plaintiff's right to maintain the action that he shall produce the certificate of the umpire. This is in substance an appeal from the decision on that point of the Divisional Court in *Randle* v. *Clay Cross Co.* (1) The plaintiff worked five days out of the six possible working days during the week in question, and therefore complied with rule 5 of the district rules, which provides that a workman "shall forfeit his right to wages at the minimum rate during any pay in which he has not worked at least five-sixths of his possible working days, unless prevented from working by

(1) [1913] 3 K. B. 795.

accident or illness." No question therefore arises upon that. Nor was there any dispute that the plaintiff was a "workman" as defined by the Act. The admission was that there was some dispute coming within rule 8. Sect. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, gives to a "workman," as defined in s. 5, a right to wages at not less than the minimum rate settled under the Act and applicable to him, unless it is certified that he is a person excluded from the operation of this provision, or that he has forfeited his right to wages at the minimum rate by reason of his failure to comply with the conditions as to the regularity or efficiency of the work laid down by the rules. The person "excluded" there means the aged or infirm workman who is, by sub-s. 2, excluded by the district rules from the right to wages at the minimum rate. Therefore unless a certificate is produced depriving him of his prima facie right to wages at the minimum rate he is entitled to succeed. The employer, in order to defeat the workman's prima facie right, must produce the certificate. The workman need not produce it in support of his claim. Sub-s. 2 in its first clause provides that the district rules shall lay down conditions with respect to the exclusion of aged and infirm workmen from the right to wages at the minimum rate and with respect to the regularity and efficiency of the work; and in its second clause the sub-section provides the machinery for the decision of any dispute upon those matters by setting up what may be called a domestic tribunal, which is to give a certificate of its decision thereon. Sub-s. 2 merely carries out the provisions of sub-s. 1 beginning with "unless it is certified." It does not extend beyond that; and the words in the second clause of sub-s. 2, "whether any workman in the district is a workman to whom the minimum rate of wages is applicable," refer to the exclusion of aged and infirm workmen mentioned in the first clause. There is no provision in the Act requiring a miner who is suing for wages at the minimum rate to produce a certificate of the domestic tribunal that he is a workman to whom the minimum rate of wages is applicable. The effect of the decision in *Randle* v. *Clay Cross Co.* (1) is to alter the language of s. 1, sub-s. 1, of

(1) [1913] 3 K. B. 795.

C. A. 1914

BARWELL v. ABERCARN BLACK VEIN STEAM COAL COMPANY, LIMITED.

the Act by making it read that the employer shall pay to the workman wages at the minimum rate if the workman produces a certificate that he is a workman to whom the minimum rate is applicable. That decision is wrong. In that case, however, the certificate was in fact produced, and it was against the workman. Suppose that there is no dispute, the production by the plaintiff of a certificate cannot be a condition precedent to his right to sue. The certificate is a defence to the employer, and is no part of the workman's case. The county court judge might have adjourned the hearing for the production of the certificate by the defendants. If there is a certificate in existence the defendants ought either to produce it or to ask for an adjournment to enable them to do so. If the defendants refuse to produce it the judge ought to give judgment for the plaintiff. He was wrong in giving judgment for the defendants. [*Davies* v. *Glamorgan Coal Co.* (1) was also referred to.]

Scott Fox, K.C., and *Harold Morris*, for the defendants. In the opening statement of the plaintiff's counsel in the county court it was admitted that there was a dispute, and that the dispute had been referred to an umpire under rule 8. That being so, in order to entitle the plaintiff to wages at the minimum rate he had to make out his case, and for that purpose he had to show that he was a "workman to whom the minimum rate of wages is applicable." Sect. 5 defines "workman" as "any person employed in a coal mine below ground" other than certain specified persons. The domestic tribunal is, by the express words of the second clause of s. 1, sub-s. 2, the proper tribunal to decide that question. It is for the domestic tribunal to decide whether he is a workman to whom the minimum rate is applicable, and if so what class of workman he is; for instance, whether he is a collier, or a collier's helper, or a timberman, or a person employed occasionally or casually only. The minimum wage varies according to the class of workman. Therefore under that part of s. 1, sub-s. 1, preceding the words "unless it is certified" it is for the plaintiff to show affirmatively that he is a workman to whom the minimum rate is applicable, and what class of workman he is. If there is any dispute about

(1) [1914] 1 K. B. 674.

those questions, they are by the second clause of s. 1, sub-s. 2, and by rule 8 of the district rules referred to the domestic tribunal to decide. They are not questions which the county court judge can decide. To prove that he is entitled to wages at the minimum rate the plaintiff must put in the certificate of the tribunal. So also, if the dispute is whether the plaintiff is excluded by being old or infirm or has forfeited his right to wages at the minimum rate by reason of his failure to comply with the conditions with regard to the regularity or efficiency of the work, that dispute must go before the domestic tribunal, and the plaintiff must produce the certificate of that tribunal. The production of a certificate of the decision of that tribunal is a condition precedent of the plaintiff's right to sue. That is the effect of the decision in *Randle* v. *Clay Cross Co.* (1) If the plaintiff does not produce the certificate the judge must give judgment for the defendants, unless in his discretion he grants an adjournment for the purpose of its production. The plaintiff cannot advance a step in the absence of the certificate. If he sues before the certificate is given, and judgment is given against him on that ground, he can bring a fresh action when the certificate is given. It is like a plaintiff suing for the price of goods sold and delivered before the term of credit has expired. There is no evidence here as to what the nature of the dispute was. The only statement was that it was "properly submitted to umpire under rule 8 (*b*)." There was no admission that the plaintiff was a workman to whom the minimum rate of wages was applicable. The production of a certificate is therefore a condition precedent to the plaintiff's right to sue. Further, the plaintiff, having admitted that there was a dispute which had been referred to the domestic tribunal, has cast doubt upon his being a workman to whom the minimum rate of wages is applicable, and he must produce the certificate before the county court judge can proceed further.

F. A. Greer, K.C., in reply.

BUCKLEY L.J. Sect. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, contains the words "unless it is certified," and

(1) [1913] 3 K. B. 795.

C. A. 1914

BARWELL v. ABERCARN BLACK VEIN STEAM COAL COMPANY, LIMITED.

Buckley L.J.

sub-s. 2 provides that the district rules shall make provision for a certificate being given. This case is brought before the Court to obtain a decision upon the question whether or not, when a miner sues to recover wages at the minimum rate, the production by him of a certificate is a condition precedent to his maintaining the action. Is it a condition precedent to his right to sue that he shall have obtained a certificate under the Act?

The scheme of the Act is as follows. It confers upon a certain class of persons a right to wages at a rate not less than a minimum rate. A person to be a member of that class must be "a workman underground in a coal mine." The class is cut down by the exclusion of such persons as come within s. 5, sub-s. 1 (*a*), (*b*), (*c*), (*d*), or (*e*). A workman, however, may be within the class as above defined, and still may be excluded from it by a certificate under s. 1, sub-s. 1. The certificate there referred to is either "that the workman is a person excluded under the district rules from the operation of this provision, or that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions with respect to the regularity or efficiency of the work to be performed by workmen laid down by those rules." These disqualifications which are to be the subject of a certificate are elaborated and the machinery for determining them is provided by s. 1, sub-s. 2. That sub-section provides: "The district rules shall lay down conditions, as respects the district to which they apply, with respect to the exclusion from the right to wages at the minimum rate of aged workmen and infirm workmen." That is the first head of exclusion. The second head is this: "And shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen, and with respect to the time for which a workman is to be paid in the event of any interruption of work due to an emergency, and shall provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with conditions as to regularity and efficiency of work, except in cases where the failure to comply with the conditions is due to some cause over which he has no control." So that the class may be cut down by excluding therefrom aged and infirm workmen, and workmen who do not comply

with conditions as to regularity and efficiency of work. Such persons may be visited with the penalty of forfeiting their right to wages at the minimum rate. The next clause of sub-s. 2 sets up the tribunal to determine those matters. "The district rules shall also make provision with respect to the persons by whom and the mode in which any question, whether any workman in the district is a workman to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with the conditions laid down by the rules has forfeited his right to wages at the minimum rate, is to be decided, and for a certificate being given of any such decision for the purposes of this section." That is the certificate referred to in sub-s. 1 under the words "unless it is certified." In the words of that clause "with respect to the persons by whom and the mode in which any question whether any workman in the district is a workman," &c., I must read the word "workman" as having the meaning given to it by s. 5, sub-s. 1. It means a workman underground in a coal mine who is not excluded by any one of the clauses (*a*), (*b*), (*c*), (*d*), or (*e*) of that sub-section. That matter is not to be the subject of arbitration. There may, however, be a matter for arbitration. A man may be a workman having regard to s. 5, and there may still be a question as to what class of workman he is. For instance, is he a collier, or a filler, or a timberman; a different rate of wages may be applicable to each of those classes of workmen. That question is not determined by the Act, and may be the subject of arbitration.

What occurred in this case was as follows. A workman sued in the county court to recover 11*s.* 3*d.* for wages due to him. The employers put in this defence: "That the matter in dispute between the parties in this action was referred to Louis H. Hornby, Esq., in pursuance of the district rules for the district of South Wales and Monmouthshire made in pursuance of the Coal Mines (Minimum Wage) Act, 1912, and the said Louis H. Hornby, Esq., certified in writing on the 22nd day of January, 1913, that the plaintiff was not entitled to the amount claimed." At the hearing before the county court judge the case only proceeded

C. A. 1914

BARWELL v. ABERCARN BLACK VEIN STEAM COAL COMPANY, LIMITED.

Buckley L.J.

this far. Counsel opened the case and the plaintiff was called as a witness. In the course of the opening rule 8 of the district rules was referred to. That rule provides: "Should any question arise as to whether any particular workman employed underground is a workman to whom the minimum rate is to apply, or whether a workman has failed to comply with any of the conditions contained in these rules, or whether by non-compliance with any of these rules such workman has forfeited his right to the minimum rate"—those are substantially the words of the second clause of s. 1, sub-s. 2—"such question shall be decided in the following manner," and clause (*b*) says that, failing agreement, the decision is to be by an umpire. The judge's note contains this statement: "Admitted properly submitted to umpire under rule 8 (*b*)." It seems to me that that was an admission that some question under rule 8 had arisen—what it was we do not on the materials before us know—and that the dispute had been properly submitted to the umpire under that rule. There the matter stops. What happened on that reference the county court judge did not know, and we do not know. All we know is that some dispute such as is described in rule 8 has been referred to the umpire. That having taken place, and the plaintiff being still in the witness-box, the judge's note runs thus: "Mr. James" (he was counsel for the plaintiff) "admitting that he cannot put in certificate of umpire in support of plaintiff's case, and admitting *Randle's Case* (1) fatal to him in this Court, and Mr. Prosser submitting defendants are entitled to judgment on that ground, judgment for defendants with costs on scale C. Leave to appeal." That is all that took place in the county court. It seems to have been assumed that the plaintiff must put in the certificate as appears from the words "admitting *Randle's Case* (1) fatal to him." *Randle's Case* (1) was to the effect that it was a condition precedent to the right to sue that the plaintiff should have obtained a certificate. So that the decision in the county court apparently comes to this, that the judge, not knowing whether the reference was or was not concluded, and the plaintiff's counsel admitting that he could not put in a certificate, gave judgment for the defendants.

(1) [1913] 3 K. B. 795.

The question is whether that is right. To my mind it is not.

In the first place I do not think that a certificate under s. 1, sub-s. 1, is a condition precedent to the plaintiff's right to sue. There is one case in which obviously it is not. If there is no dispute between the parties as to any of the matters referred to in the Act, there would be no reference and no certificate, and yet the plaintiff may be perfectly entitled to recover. Was it then essential at the stage at which these proceedings arrived in the county court that the plaintiff should produce the certificate? In my opinion it was not. The hearing of the case ought to have proceeded, and in the result the document which the defendants say is a certificate would have been put in, as Mr. Scott Fox has told us, by the defendants, if the plaintiff did not put it in. There would then have arisen what I suppose is the real dispute between the parties. I understand—I cannot say that it is the fact, because it is not proved—that the umpire did something on January 22, 1913. The defendants say that a certificate was given by him on that day. The plaintiff says it was not. Why the plaintiff says so I do not know. That will, I suppose, ultimately turn out to be the question between the parties. It has never reached that stage. In this state of things what seems to me to be right is this: we must set aside the judgment for the defendants and remit the case to the county court judge for further hearing. I do not feel myself bound to determine which party, if any, will have to put in the certificate. As I have said, it is not a condition precedent to the plaintiff's right to sue that he should produce the certificate. It may be that the onus will be on the defendants to prove that such a certificate has been made as that the plaintiff is disqualified under the Act. On the other hand the plaintiff's case may be such that he will have to produce the certificate. It seems to me to depend upon the way the case goes. The language of the Act is this, not that the workman shall recover if he is certified to be right, but that he shall recover unless he is certified to be wrong. If the case is one in which the matter must be governed by a certificate, I think it stands in this way. There are two tribunals which have to adjudicate upon the matter. There is the

C. A. 1914

BARWELL v. ABERCARN BLACK VEIN STEAM COAL COMPANY, LIMITED.

Buckley L.J.

ordinary tribunal, in this case the county court, in which the action is brought. But there is a question which that tribunal cannot determine. That is for another tribunal, namely, the domestic tribunal under the Act of 1912. If it transpires before the county court judge that the question before the domestic tribunal is still sub judice, it appears to me that the county court judge cannot proceed further until he knows what that tribunal has decided. He does not know a fact essential to his judgment, and the case ought to stand over until that question has been determined. If, on the other hand, there has been a determination by the domestic tribunal, I do not see how the county court judge can proceed unless he knows what it is. The determination arrived at by that tribunal is an essential factor for the purpose of his judgment. He must know it somehow or other. Whether he is to know it by the plaintiff or the defendants putting in the certificate will depend upon the way the evidence is put before him, and whose case necessitates it. I leave it simply in this way. We discharge the judgment which has been given, and send the case back to the county court judge for further hearing, with an intimation to him that the production by the plaintiff of the certificate in question is not a condition precedent to his right to sue.

PHILLIMORE L.J. I agree. Under s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, it is "an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman, unless" something is certified. Sect. 5 defines "workman" as being any person employed in a coal mine below ground other than certain specified persons and any other official of the mine whose position is recognized by the joint district board as being different from that of a workman. The Act so far entitles a workman to sue for his wages at the minimum rate in any Court appropriate for the purpose, and prima facie that Court has to determine whether he shall recover. But certain matters are by later portions of the section referred to what I may call a trade tribunal, which alone can

determine them. If there is a dispute which is only justiciable by the trade tribunal the Court, whether the High Court or the county court, cannot determine the case until it knows how the trade tribunal has decided. It is not to be inferred, however, from the fact of the workman suing for his wages that there is any such dispute, and therefore it is not for the workman to show that there has been a determination by the trade tribunal. Unless it is proved or admitted that there is some dispute justiciable by the trade tribunal the Court proceeds in the ordinary way. But once it is proved that there is such a dispute the Court cannot proceed until it knows how that dispute has been determined by the trade tribunal. It seems to me probable that there are two classes of disputes determinable by the trade tribunal, one of which comes under the words of sub-s. 1 which I have read and the other under the words following "unless it is certified." There may be questions upon the construction of the Act as to the conditions entitling the workman to sue which the Court must determine, but at the same time it is probable—though I do not decide it—that there are other matters which if disputed must be determined by the trade tribunal. "Wages at not less than the minimum rate settled under this Act and applicable to that workman" may necessitate inquiry as to what class of workman he belongs to. Under the rules in this district there are numerous classes of workmen with a standard rate of day wages applicable to each class, and it is obvious that there may be questions as to the rate of remuneration payable to a workman, questions which would have to be determined and would be best determined by the trade tribunal, and which I am inclined to think are intended to be determined by that tribunal. If it is shown to the county court judge—I am assuming a case in the county court — that the dispute concerns that matter, which is a matter included in the words of s. 1, sub-s. 1, preceding "unless it is certified," it seems to me that it would be necessary for the workman to show that the dispute has been determined by the trade tribunal and how it has been determined. In that case, if I am right in thinking that this class of dispute is for the trade tribunal, the workman would have to prove that the dispute had been decided in his favour. That is not the certificate

C. A. 1914

BARWELL v. ABERCARN BLACK VEIN STEAM COAL COMPANY, LIMITED.

Phillimore L.J.

contemplated by the Act under the words "unless it is certified." When I come to the more common class of disputes determinable by the trade tribunal, namely, whether the workman is a person excluded under the district rules from the operation of s. 1, sub-s. 1, or has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions as to regularity or efficiency of the work laid down by the district rules, the section is clear that the workman is to recover unless the employer can produce a certificate that the workman is not entitled. In each case directly it is shown that there is a dispute justiciable by the trade tribunal the county court judge cannot proceed until it is shown how the dispute has been determined. We do not often find in our system of law a tribunal within a tribunal, but there are such cases. One which occurs to me as the most apposite is the case of a suit in an Ecclesiastical Court to recover a due or fee founded on a custom where the custom was put in issue. In that case the Common Law Courts held that the Ecclesiastical Court could not try the custom, and directly the issue was raised as to the custom the Ecclesiastical Court must hold its hand propter defectum triationis until the appropriate Common Law Court had decided the issue as to the custom. That is an analogy which explains to my mind the intention of this Act. The result is that in the first class of case the workman would have to prove that the decision of the trade tribunal was favourable to him, and in the second class the workman would not be bound to show that the decision was in his favour, and when once it had been shown to the county court judge that the trade tribunal had decided the matter he should assume that the decision was in the workman's favour unless a certificate was put in evidence by the employer stating that the decision was adverse to the workman. Therefore the deduction which, we are told, many county court judges have made from the decision in *Randle* v. *Clay Cross Co.* (1), that the workman must in all cases produce a certificate in his favour, is wrong. A workman need not produce a certificate in his favour unless, as I am inclined to think, he admits that there is a dispute justiciable by the trade tribunal under that part of s. 1, sub-s. 1, which precedes the

(1) [1913] 3 K. B. 795.

words "unless it is certified" as to the minimum rate of wages applicable to him; but if the dispute comes under the words following "unless it is certified," the employer is bound to prove that the result is in his favour. In either case, however, the county court judge cannot proceed further, once it is admitted or proved that there is a dispute justiciable by the trade tribunal, until he knows that it has been determined and what the decision is. There are many contracts which contain an arbitration clause where the party can sue and have the dispute determined in a Court of law unless the Court upon application by the other party under the Arbitration Act, 1889, stays the proceedings upon the ground that the dispute ought to be referred to arbitration. There are other contracts, frequently seen in policies of insurance, where the obtaining of an award from an arbitrator is a condition precedent to the right to sue. I do not think that it is a condition precedent to an action by a workman that the dispute justiciable by the trade tribunal should have been determined by that tribunal in his favour. In such a case the county court judge should hold his hand until the trade tribunal has determined that dispute, and should not give judgment for the defendant upon mere proof that there is such a trade dispute. Therefore the workman will obtain these advantages from our decision: In the first place it is not necessary in all cases to have a certificate, and in the next place it is not necessary that the dispute should have been determined by the trade tribunal in the workman's favour before he brings his action. In the third place, though the point is not raised in this case, in the case of a trade dispute coming under the words "unless it is certified" it will be assumed to have been determined in his favour unless the contrary is proved by the employer.

These are the grounds upon which I agree that it is desirable to remit the action to the county court, in order that the judge may have any further question, if there is any further question, tried out. I should be inclined to conjecture that the question of the obtaining of the certificate being a condition precedent to the right to sue is the only question between the parties, but it may be otherwise. There may be some dispute about

C. A. 1914

BARWELL v. ABERCARN BLACK VEIN STEAM COAL COMPANY, LIMITED.

the certificate itself, and the parties are entitled to have it determined.

PICKFORD L.J. I agree. The question which we have to decide is whether it is a condition precedent to the workman's right to sue that he should produce a certificate that he is a workman entitled to sue; that is to say, using the language of the head-note in *Randle* v. *Clay Cross Co.* (1), that he should have obtained a certificate that he is a workman to whom the minimum rate of wages is applicable. With a laudable intention to save time and expense, this case when in the county court was cut short as soon as that appeared to be the point, because it was thought that the point was sufficiently raised upon the materials then before the county court judge. I am not sure that some confusion has not been caused, as is often the case, by the Court taking a short cut to the point instead of letting the case pursue its normal course, because on the evidence before the county court judge there was nothing to show whether the dispute, which it was admitted existed and had been properly referred to the domestic tribunal under rule 8 of the district rules, had or had not been determined. That might be a matter of some importance, but I do not think it is important for the point which we have to decide.

By s. 1, sub-s. 1, of the Coal Mines (Minimum) Wage Act, 1912, it is provided that "it shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman, unless it is certified" that he is excluded under the district rules from the operation of this provision or that he has forfeited the right to wages at the minimum rate by failure to comply with the conditions as to the regularity or efficiency of the work laid down by those rules. As has been pointed out, the sub-section does not say that there shall be an implied contract in the case of every workman who is certified to be a person to whom the minimum rate of wages applies, but that every workman shall be entitled unless it is certified that he is not. If that were the whole of the section it seems to me that it would be clear

(1) [1913] 3 K. B. 795.

that the person who has to produce the certificate is the person who says that the workman is certified as being excluded under the district rules or as having forfeited his wages. There is no provision for a certificate to the effect that he is a person within the Act or that he has not forfeited his right to wages at a minimum rate. The Act does not contemplate any such certificate. It only contemplates in this sub-section a certificate that he is excluded or has forfeited his right to wages at a minimum rate. If that stood alone, I think it would be beyond dispute that all that the workman had to prove was that he was a workman underground in a coal mine. It might and probably would be that in order to prove that he was a "workman" he would have to show that he was not within the exceptions in s. 5 of the Act, because if he comes within one of those exceptions he is not a workman. In order to launch his case he would have to prove that he was a "workman." Having proved that, he is entitled to wages at not less than the minimum rate under that sub-section unless something is certified to the contrary. It is said that the subsequent sub-section alters that. I am not sure that I take the same view—in fact I do not think I do—of the latter part of sub-s. 2 as is taken by Phillimore L.J. In my view sub-s. 2 is, with one exception, machinery for carrying out that part of sub-s. 1 which follows the words "unless it is certified," which I will call the "unless" clause. The first part of sub-s. 2 is: "The district rules shall lay down conditions, as respects the district to which they apply, with respect to the exclusion from the right to wages at the minimum rate of aged workmen and infirm workmen"—that is the first part of the "unless" clause in sub-s. 1—"and shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen, and with respect to the time for which a workman is to be paid in the event of any interruption of work due to an emergency, and shall provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with conditions as to regularity and efficiency of work," except in certain cases. With the exception of the words referring to the time for which the workman is to be paid in an emergency, that carries out the second part of the "unless" clause. The second

C. A. 1914

BARWELL v. ABERCARN BLACK VEIN STEAM COAL COMPANY, LIMITED.

Pickford L.J.

part of sub-s. 2 is this: "The district rules shall also make provision with respect to the persons by whom and the mode in which any question whether any workman in the district is a workman to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with the conditions laid down by the rules has forfeited his right to wages at the minimum rate, is to be decided, and for a certificate being given of any such decision for the purposes of this section." I am inclined to think, though it is not absolutely necessary to decide it in this case, that that merely provides for the setting up of the tribunal to decide the matters mentioned in sub-s. 1 and the first part of sub-s. 2, and that the question "whether any workman in the district is a workman to whom the minimum rate of wages is applicable" means no more than this: whether he is a workman who is "excluded under the district rules from the operation of this provision" as mentioned in sub-s. 1. It has been argued that it refers to a question whether the workman is a workman to whom the particular rate of wages which he is claiming is applicable. I do not myself think that is its meaning. Rule 8, which is made under that provision, reads: "Should any question arise as to whether any particular workman employed underground is a workman to whom the minimum rate is to apply, or," &c., the question shall be settled in a certain way. That language whether in the sub-section or in the rule does not seem to me to be appropriate to a dispute as to whether a workman belongs to a particular class of workmen, for instance, whether he ought to claim as a haulier or as a roadman when he is claiming as a collier. It seems to me to be more consistent with the meaning which I attach to it, that is, whether he is a workman to whom the provisions as to the minimum rate of wages are to apply. I am strengthened in that opinion by the fact that the second clause of sub-s. 2 provides "for a certificate being given of any such decision." I find in sub-s. 1 that there is to be a certificate under the "unless" clause, but I find no provision for any other certificate, and that also seems to me to point to these words, "whether any workman in the district is a workman to whom the minimum rate of wages is applicable," being confined to the

question whether he is excluded from the operation of the provision as to the minimum rate of wages. If that be so, it stands upon the same footing as the forfeiture clause, and is a matter upon which, if the employer wishes to succeed, he must produce the certificate. It is for him to show exclusion.

Further, it seems to me that, even assuming the clause to have the wider meaning and to apply to a case where the question is whether a workman is claiming the rate of wages appropriate to his position in the mine, in order to make it necessary that that should be decided by the domestic tribunal it must be shown that there has been a dispute upon that question. It is not enough to say that there has been some dispute. Take a case where the parties on coming into Court say that there is no dispute as to the rate of wages to which the plaintiff is entitled if he is entitled at all, but there is a dispute as to whether he comes within the Act; or that the dispute is whether or not he has forfeited his right to wages. In either of those cases it seems to me that, even interpreting the clause in the wider sense, it would not apply, because where there is no dispute upon the matter it cannot be necessary for the plaintiff to produce a certificate with regard to it. I do not agree that the Court cannot inquire what the dispute is as soon as it is informed that there is a dispute. It is entitled to inquire what the dispute is, and to see upon whom lies the burden of saying that he is right in that dispute. In this case it is not shown what the dispute is, and therefore, even if this clause had the meaning which I do not think it has, there was no dispute shown under that part of the sub-section, and therefore there was no necessity for the workman to show what was the decision of the domestic tribunal upon that point. In either case, therefore, it seems to me that there was no necessity for him to produce the certificate that he comes within the Act.

The view which I am expressing is, no doubt, contrary to the decision in *Randle* v. *Clay Cross Co.* (1) A great deal of the discussion in that case seems to have turned upon whether rule 4 of the district rules was or was not ultra vires. To some extent the Court seems to have founded its decision upon the

(1) [1913] 3 K. B. 795.

C. A. 1914

BARWELL v. ABERCARN BLACK VEIN STEAM COAL COMPANY, LIMITED.

Pickford L.J.

opinion that it was not ultra vires. At that time the decision of the Court of Appeal in *Davies* v. *Glamorgan Coal Co.* (1) had not been given. That decision was that a similar rule was ultra vires, and, therefore, so far as *Randle* v. *Clay Cross Co.* (2) depended upon that argument it is not now, since the decision of the Court of Appeal, correct. I do not myself see that the question whether the rule was or was not ultra vires had anything to do with the question whether the onus was upon the plaintiff to produce the certificate. There is nothing in the present case to show that there was any dispute, taking the widest view of the Act, in respect of which the plaintiff had to produce a certificate, and therefore I think the decision of the county court judge was wrong.

Where there is a dispute which has to be settled by the domestic tribunal, it may be in one of three stages. It may never have been referred to the domestic tribunal; it may have been referred and not decided; or it may have been referred and decided. It seems to me that a defendant, in order to entitle him to judgment, must show that there is a dispute, that it has been referred, and that it has been decided in his favour. If it has been decided, it is, in my opinion, for him to produce the certificate. If there be no certificate, then there is no decision against the workman; the workman has not to produce the certificate. If it has not been decided, then I think that the county court judge should not proceed with the case until it has been decided. I do not think that the workman is entitled to come into Court and say that there is a dispute; that the competent domestic tribunal has seisin of it, and has not disposed of it; that therefore there is no certificate and that he is entitled to judgment. It seems to me that that is a fallacy, and I do not know whether the plaintiff contends for it here or not. The county court judge should in such a case refuse to proceed until the dispute has been decided by the competent tribunal; and I should think that he would, though this must depend upon the circumstances of each case, order the plaintiff, who had brought his action knowing that there was this dispute in course of decision, to pay all the costs occasioned by his so doing. That

(1) [1914] 1 K. B. 674. (2) [1913] 3 K. B. 795.

would be for the county court judge to decide in each case, but I should think that that would be the ordinary course he would take. I do not think that state of facts would entitle the defendant to judgment. I agree that the decision of the Divisional Court was wrong, and that the case ought to be remitted to the county court on the terms that have been mentioned.

Appeal allowed and case remitted to the county court.

The order (omitting formal parts) as drawn up was as follows:—"It is ordered that this appeal be allowed, that the said order and the said judgment obtained for the defendants in the action be severally set aside, and that the matter of the action be referred back to the learned county court judge for rehearing with a direction that it is not a condition precedent at the stage at which the hearing stood that the plaintiff should produce the certificate of the umpire referred to in paragraphs 8 and 9 of the award of Lord St. Aldwyn dated the 5th day of July, 1912, and made under the provisions of the Coal Mines (Minimum Wage) Act, 1912."

Solicitors for plaintiff: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for defendants: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

W. F. B.

C. A.
1915
March 5.

[IN THE COURT OF APPEAL.]

THE KING *v.* AMENDT.

Crown Office—Certiorari—Time Limit—Fiat of Attorney-General—Practice—Licensing Acts—Order of Confirming Authority—Crown Office Rules, 1906, *rr.* 20, 21.

Rule 21 of the Crown Office Rules, 1906, provides, among other things, that no writ of certiorari shall be granted, issued, or allowed to remove any judgment, order, conviction, or other proceeding had or made by or before any justices of the peace, unless the writ be applied for within six calendar months next after such judgment, order, conviction, or other proceeding shall be so had or made:—

Held, that this provision does not apply to the issue of a writ of certiorari at the instance of the Attorney-General on behalf of the Crown.

Appeal from an order of the King's Bench Division superseding a writ of certiorari and discharging a rule nisi to quash an order of justices.

On January 21, 1914, an order nisi was obtained against the respondent to show cause why there should not be quashed a certain order made by the justices of Essex, acting as the confirming authority under the Licensing (Consolidation) Act, 1910, on April 16, 1913, confirming a licence granted to the respondent at a general annual licensing meeting on March 11, 1913, for the sale by retail of intoxicating liquor at licensed premises on the platform of the Great Eastern Railway Station at Witham.

From the evidence it appeared that at a general annual licensing meeting in the year 1906 the licensing justices for Witham granted to the respondent a justices' licence authorizing him to hold an excise licence to sell by retail at the railway refreshment rooms at Witham any intoxicating liquor which may be sold under a spirit retailer's licence for consumption either on or off the premises, subject to a monopoly value payment of 30*l.* per annum to be raised after five years to 40*l.* per annum, the licence being granted to expire on April 5, 1907. The grant of this

licence was duly confirmed by the confirming authority, and the licence was renewed at each subsequent general annual licensing meeting up to and including the meeting in the year 1913. The sums on account of monopoly value had been duly paid, and the respondent had continuously carried on at the said premises the business of a public-house keeper.

On February 11, 1913, at the general annual licensing meeting an application was made on behalf of the respondent for the grant of a new licence in respect of the same premises. This grant was opposed on behalf of the Commissioners of Customs and Excise on the ground that it amounted to an application to revise the amount of the monopoly value.

On March 11, 1913, the justices granted to the respondent a new licence for a term of five years at a monopoly value of 15*l.* per annum, renewing at the same time the existing licence. The new licence was made subject to the following conditions:—"For a term of five years at a monopoly value of 15*l.* subject to confirmation and on condition that the existing licence (which was renewed) is surrendered immediately on the new licence becoming effectual."

On April 16, 1913, at a meeting of the confirming authority application was made by the respondent for the confirmation of the licence so granted. The confirmation was opposed on the ground that the licensing justices had no power to grant a licence as a new justices' licence at a lower monopoly value, inasmuch as there was a similar licence in force in respect of the same premises at the date of the application. The confirming authority confirmed the licence subject to the conditions attached to the grant by the justices.

At the instance of the Attorney-General a writ of certiorari was on January 3, 1914, issued, and on January 5, 1914, served, to bring up the order of the confirming authority; and on January 21, 1914, the order nisi to quash the order of confirmation was obtained as aforesaid.

Upon showing cause, the objection was raised on behalf of the respondent that the writ of certiorari ought not to have been issued because it had not been applied for within six calendar months after the order of the confirming authority had been

C. A. 1915

REX v. AMENDT.

made, as required by r. 21 of the Crown Office Rules, 1906. (1) The Divisional Court upheld the objection and made an order for a writ of supersedeas to issue, and discharged the rule nisi for an order to quash.

The Attorney-General appealed.

Sir J. Simon, A.-G., Sir S. O. Buckmaster, S.-G., and *Daldy*, for the Crown. In this case the writ of certiorari was issued as of course from the Crown Office on the fiat of the Attorney-General, and the only proceeding required to be taken in Court was the motion to quash the order which had been brought into Court. That being so, the order was in Court and its validity could be questioned on motion.

Rule 21 does not apply to a certiorari issued at the instance of the Attorney-General; it is merely an appendage to r. 20, which clearly applies only to applications for writs of certiorari other than those issued at the instance of the Attorney-General.

(1) Crown Office Rules, 1906:—

Rule 20. Every application for a writ of certiorari to remove any judgment, order, conviction, or other proceeding had or made by or before any justice or justices of the peace of any county . . . . or the respective general or quarter sessions thereof into the King's Bench Division at the instance of any person other than the Attorney-General on behalf of the Crown, for the purpose of quashing the same, shall during the sittings be made to a Divisional Court by motion for an order nisi to show cause, or in vacation or while there is no sitting of a Divisional Court, to a judge at chambers, for a summons to show cause, and no such writ of certiorari shall be granted or awarded unless an order nisi or summons as aforesaid shall have first been obtained and served in accordance with the following rule.

Rule 21. No writ of certiorari shall be granted, issued, or allowed to remove any judgment, order, conviction, or other proceeding had or made by or before any justice or justices of the peace of any county . . . . or the respective general or quarter sessions thereof, unless such writ of certiorari be applied for within six calendar months next after such judgment, order, conviction, or other proceeding shall be so had or made, and unless it be proved by affidavit that the party suing forth the same has served the order nisi or summons six days before the return day of the order nisi or summons for the writ on the justice or justices, or on two of them, if more than one, by or before whom such judgment, order, conviction, or other proceeding shall be so had or made, in order that such justice or justices, or the parties therein concerned, may show cause, if he or they shall so think fit, against the granting, issuing, or allowing such writ of certiorari.

Therefore r. 21, following upon r. 20, must also be read as applying only to cases other than writs issued at the instance of the Attorney-General. Both those rules are quite inapplicable when the application is a motion to quash the order after it has been brought up. Rule 21 follows s. 5 of 13 Geo. 2, c. 18, upon which it was decided that it had no application to writs issued at the instance of the Attorney-General on behalf of the Crown: Corner's Crown Practice, pp. 67, 69; *Rex* v. *Clace or Lewis* (1); *Rex* v. *Battams.* (2) The construction of r. 21 must be the same: *In re Demerara Co.* (3) Sect. 6 of the Statute Law Revision and Civil Procedure Act, 1881 (4), applies only to civil procedure, and, therefore, the power thereby given of making rules to bind the Crown cannot apply to certiorari.

Upon the true construction of rr. 20 and 21 they do not apply to the Crown, and, therefore, it is unnecessary to consider whether they would be ultra vires if they were so expressed as to apply to the Crown. Further, these rules must be treated as if incorporated in the statute, and a statute will bind the Crown only if it expressly purports to do so. Here r. 21 does not expressly purport to bind the Crown, and any inference which can be drawn from the fact that r. 20 expressly excepts the Attorney-General cannot have the effect of an express application to the Crown: *Weymouth* v. *Nugent.* (5)

Ryde, K.C., and *C. E. Jones*, for the respondent. It begs the whole question under discussion to say that r. 21 is only an appendage of r. 20. Rule 21 is wider than r. 20, and it is a much older rule; therefore it must not be construed with reference to r. 20. Rule 21 follows 5 Geo. 2, c. 19, and s. 5 of 13 Geo. 2, c. 18. Those statutes did not apply to the Crown because the Crown was not expressly named. The Crown not being expressly named in the Judicature Act, 1875, rules made thereunder might not apply to the Crown. To meet that difficulty s. 6 of the statute of 1881 (4) provides that "the enactments relating to the making of rules of Court contained

(1) (1769) 4 Burr. 2456.
(2) (1801) 1 East 298, 303, note (*d*).
(3) [1913] 1 Ch. 331, at p. 335
(4) 44 & 45 Vict. c 59.
(5) (1865) 6 B. & S. 22.

C. A. 1915

REX v. AMENDT.

in the . . . . Judicature Act, 1875, and the Acts amending it, shall extend and apply . . . . to all proceedings by or against the Crown." In pursuance of that power the Crown Office Rules, which relate mainly to the business of the Crown, were made, and they must have been intended to apply to the Crown. These two rules were copied from 5 Geo. 2, c. 19, and 13 Geo. 2, c. 18, the one rule expressly excluding the Crown and the other not. Therefore the second rule is applied to the Crown.

It is in the discretion of the Court to refuse the writ of certiorari, and in a case like this that discretion ought to be exercised when a person has carried on trade as a licensee under an order of the confirming authority for more than six months: *Reg.* v. *Justices of Surrey.* (1)

LORD READING C.J. This is an appeal from the decision of the Divisional Court, which raises an important question with reference to the right of the Attorney-General to obtain a writ of certiorari from the King's Bench Division in effect to bring up an order which was made more than six months before the application. When the case came before the Divisional Court, a preliminary objection was taken by Mr. Ryde that r. 21 of the Crown Office Rules, 1906, was a complete answer, and that in fact no writ of certiorari ought to have been issued. The Attorney-General contends before us, as it was contended on behalf of the Crown before the Divisional Court, that r. 21 has no application to the Attorney-General when acting on behalf of the Crown, and that consequently the decision of the Divisional Court was wrong and should be reversed.

In order to understand the point it is necessary to keep clearly in mind the difference between the right of the Attorney-General to a writ of certiorari and that of an ordinary member of the public or any person other than the Attorney-General. The Attorney-General on behalf of the Crown can issue his fiat for an application to be made, and when he has issued his fiat, it is taken to a judge of the King's Bench Division, who usually makes the order by initialling the fiat which is presented to him, and upon that the Crown Office issues the writ of certiorari. The effect of

(1) (1870) L. R. 5 Q. B. 466.

that writ is to command that the order complained of be brought before the judges of the King's Bench Division. Any person other than the Attorney-General who wishes to obtain a writ of certiorari must apply, in the first instance, for a rule nisi, and then, when the matter comes before the Court, strictly speaking the person to whom it is directed shows cause, not against the quashing of the order which it is asked shall be brought up, but against the issuing of the writ. In practice, what usually happens is that the Court, having the parties before it, hears the application for the writ of certiorari and the arguments as to whether or not the order should be quashed at the same time; and usually, if the Court comes to the conclusion that the order should be quashed, it directs the issue of a writ of certiorari, and at the same time directs that the order when brought up shall be quashed. When the Attorney-General applies, as I have already said, the proceeding is not the same; he gets the writ of certiorari as of right by virtue of his position as Attorney-General acting on behalf of the Crown, that is, in these matters, as the appointed representative and custodian of the public interest. It is in that connection and in that capacity that he obtains that right. If, in the course of his duties, he has proceedings brought to his attention, which he thinks in the public interest should be brought before the King's Bench Division and quashed, it is his duty to issue his fiat on behalf of the Crown, and so bring the order before the King's Bench Division. Then follows the argument, when the document is before the Court, and the Court ascertains what the order is which is complained of, and the Court decides, after hearing the argument, whether or not the order shall be quashed. It does not then determine whether the writ of certiorari shall be issued, because in fact it is issued as of right when the Attorney-General issues his fiat. All that happens with regard to the initialling of the order by a judge of the King's Bench Division, and the issuing of the writ of certiorari from the Crown Office thereupon, is ministerial, once the Attorney-General's fiat has been issued. It is important to bear the distinction well in mind, because it has a very direct bearing upon this case.

The argument which succeeded in the Court below, and which

C. A. 1915

REX v. AMENDT.

Lord Reading C.J.

has been put before us to-day by Mr. Ryde, is that the language of r. 21, which almost reproduces the words of s. 5 of the statute 13 Geo. 2, c. 18, has the effect of placing a time limit upon the right of the Attorney-General to obtain a writ of certiorari upon his fiat. It must and does go as far as that.

It is necessary to observe, first, that certainly until r. 21 was passed in 1906 there was no ground for the suggestion that there was any such limit upon the right of the Crown. Indeed, the exact opposite was the case. It was decided upon s. 5 of 13 Geo. 2, c. 18, which is the parent of r. 21, that the words of that section did not apply to the Attorney-General. That is quite correctly stated in Corner's Crown Practice (1), from which I will quote first a passage on p. 69: "It has been frequently decided that the foregoing statutes"—including 13 Geo. 2, c. 18—"do not restrain or apply to the removal of any proceeding at the instance of the prosecutor . . . . or of the Attorney-General acting officially, whether on behalf of the prosecution or defence, upon the principle already mentioned." The principle mentioned is stated on p. 65: "Upon the principle that the right of the Crown to demand the writ cannot be taken away unless it appear by express words to be the manifest intention of a statute that it should operate to that extent." Our attention has been called to the cases of *Rex* v. *Clace or Lewis* (2) and *Rex* v. *Battams* (3), and it is sufficient to say that it could not be and is not questioned in the argument before us that until r. 21 was passed, or perhaps I should say until the Crown Office Rules were passed in 1886, the statute of 13 Geo. 2, c. 18, did not bind the Crown. Those are decisions, therefore, which are now unquestioned, that upon the same language used in a statute the Crown was not limited to the period of six months, or, in other words, that the language of the section did not apply so as to restrict the Crown to the period of six months. When, therefore, there can be no doubt that the rules passed by the Rule Committee before the statute of 1881 did not and could not bind the Crown, and since that period there seems to be equally no doubt that the Rule Committee can by rules bind the Crown,

(1) Pp. 65, 69 (ed. 1844). (2) 4 Burr. 2456
(3) 1 East, 298, 303, note (*d*).

the question must be whether that alteration leads to the conclusion that the words of r. 21 are now to have a different construction from that given to them by the judges in those earlier cases. I cannot myself see how there can be any doubt in this case. I notice that the learned judges in the Divisional Court thought that there was great difficulty. No doubt there is some complexity, and the subject requires careful examination and investigation, which we have had at the Bar both from the Attorney-General and Mr. Ryde; but once the matter is clearly laid before the Court, it seems to me it must follow that the construction to be given to these words is the construction which was given to them in the earlier days upon the statute. Looking merely at the language—and I intend to confine myself to the language used in the rule—and without placing any reliance upon the particular order in which I find the rule, that it happens to follow r. 20, and without laying stress upon the argument addressed to us as to the language which we find in r. 20, I come to the conclusion, looking simply to r. 21 and to the language there employed, that it cannot be held to bind the Crown, and that therefore this limitation of six months does not apply to the Attorney-General acting on behalf of the Crown. In substance what the language of r. 21 amounts to, briefly paraphrased, is that no writ of certiorari shall be issued unless two conditions are satisfied; it is not sufficient on the language of this rule to find that there is the performance of one condition, but not of the other. I think upon the language of the rule it is plain that it only applies when the two conditions are satisfied. First of all no writ of certiorari shall be granted unless the writ be applied for within six calendar months next after such judgment, &c.; that is the first condition; and the other is, unless it be proved by affidavit that the party suing for the same has served the order nisi six days before the return day in order that the justice may show cause, if he shall so think fit, against the granting, issuing, or allowing such writ of certiorari. Now the first condition might apply to the Attorney-General if the language of the rule in other respects was apt. The second condition can in no circumstances apply to the Attorney-General, as has been conceded at the Bar, when one bears in mind the

C. A. 1915

REX v. AMENDT.

Lord Reading C.J.

procedure under which the Attorney-General does not make an affidavit or apply in the ordinary way to the Court for the writ, but gets the writ as of right by virtue of his position as Attorney-General. Once it is clear, as it is to demonstration, that this second condition cannot and does not apply to the Attorney-General, then the argument of the respondent must and does go so far that, notwithstanding that the second condition cannot apply to the Attorney-General, we must hold that the rule does apply and treat the second condition for this purpose as if it was not in the rule. Now that seems to me to be an impossible construction. It really is reading the rule as if it said—Unless such writ of certiorari be applied for within six calendar months, and unless in the case of a writ of certiorari not obtained by the Attorney-General it be proved by affidavit, &c. Those words are not in the rule, and I can find no reason or justification for inserting them.

Therefore it seems to me clear upon the language of the rule itself that it does not apply to the Attorney-General, and that the decision of the Divisional Court was accordingly wrong and should be reversed.

I do not propose to discuss some of the other points which were raised in argument, because it seems to me quite unnecessary, as I have no doubt as to the construction of the rule upon the ordinary principles of construction, and therefore give effect to them, and base my decision upon them and upon them only.

SWINFEN EADY L.J. I am of the same opinion. The question before the Court has reference to a writ of certiorari obtained by the Attorney-General ex officio acting on behalf of the Crown. The Attorney-General by virtue of his office and acting on behalf of the Crown has the right, upon giving his fiat, to obtain from the King's Bench Division a writ of certiorari. The application is made to the Court without affidavit; his fiat sets out or refers to the order or other process which he requires to be brought up into the Court; thereupon application is made to the Court for the writ to issue; and upon the application coming before a judge there is an order immediate and absolute for the writ to issue, and it thereupon issues as of course. No order

nisi is granted. The writ is issued in the first instance. That is beyond question the well-established practice.

In the case of *Rex* v. *Clace or Lewis* (1), which was the case of a certiorari to remove an indictment at quarter sessions against several persons for not repairing a highway, Lord Mansfield said: "I believe there is a distinction (and it has been attended to lately) between an indictment only in the *name* of the *Crown* (as *all* indictments *must* be) and an indictment actually prosecuted by the *officer* of the Crown. In the latter case the King has undoubtedly a right to prosecute in what Court he pleases. I remember a case from Bristol, where the Attorney-General on behalf of the Crown"—Lord Mansfield was himself the Attorney-General to whom he thus refers—"moved for a certiorari to remove some orders of two justices made for the relief of glass-makers from an overcharge upon them by the officers of Excise; and it was holden 'that the King had a right in every case where the Crown is concerned to demand a certiorari; and that the Court are bound to grant it, unless the King's right to it is restrained by some Act of Parliament.'" He then showed how the rule is the same if the Attorney-General ex officio applies, even though he applies on behalf of the defendant; and said: "In the case of Richmond Park I prayed a certiorari as Attorney-General in the name of the Crown; and though I moved it on the part of the defendant, the Court were of opinion 'that the King's Attorney-General had a right to demand it when it appeared that the right of the Crown was in question.' Therefore in such cases the Court will exercise no discretion. But where the matter is really prosecuted only by a private person (which private person is under the control of the Attorney-General, who may stop the prosecution) there is a distinction." The question now before the Court is limited to a case where the Attorney-General ex officio and on behalf of the Crown applies for a certiorari. In such cases it has been held, notwithstanding the language of the statute 13 Geo. 2, c. 18, that the limit of time within which an application for a certiorari must be made does not apply. The language of s. 5 of 13 Geo. 2, c. 18, is substantially the same as r. 33 of the Crown Office Rules, 1886, and

(1) 4 Burr. 2456.

C. A. 1915

REX v. AMENDT.

Swinfen Eady L.J.

r. 21 of the present Crown Office Rules. In the case of *Rex* v. *James* (1), in Michaelmas Term, 26 Geo. 3, "the Court granted the Attorney-General a certiorari to remove a record of conviction after six months, although the statute 5 Geo. 2, c. 19, expressly directs that the certiorari shall be applied for within that time." So that the limit of time contained in that statute did not apply to the Attorney-General acting ex officio.

Now it was urged that since that date it has been enacted by the Statute Law Revision and Civil Procedure Act, 1881, s. 6, that the enactments relating to the making of rules of Court contained in the Judicature Act, 1875, shall extend and apply to all proceedings by or against the Crown. It is said that the rule-making authority has now full power to make rules by which the Crown shall be bound. Assume that to be so. The question is, what is the true construction of r. 21, assuming that the rule-making authority had power to bind the Crown in making the rule? This rule provides in substance the same as the old r. 33, and again in substance the same as s. 5 of 13 Geo. 2, c. 18. It provides, reading it shortly, that no writ of certiorari shall be granted unless the writ be applied for within six calendar months, and unless it be proved by affidavit that the party suing forth the same has served an order nisi, or summons, six days before the return day of the order nisi, and so on. When once we bear in mind that, in the case of a certiorari obtained by the Attorney-General ex officio, there is no rule nisi and there is no order to show cause at all, and the writ issues in the first instance without notice, it is manifest that the latter part of the rule cannot apply to such a certiorari. Then, is it possible to read the rule as applying to it? In my opinion the rule as it stands cannot be read as applying to the Attorney-General. It would be necessary to introduce words restricting such application to the earlier part of the rule, and to introduce words excluding him in the latter part of the rule. In r. 20 words are introduced, namely, "at the instance of any person other than the Attorney-General on behalf of the Crown." If we were to apply r. 21 to the Attorney-General acting on behalf of the Crown, we would have to introduce some such words as these—and if it be applied for at the instance of any person other than

(1) (1786) 1 East, 303, note (*c*).

the Attorney-General on behalf of the Crown, unless it be proved by affidavit, and so on. We would have to introduce those words to make sense of the rule. In my opinion there is no ground or justification for introducing those words, and whilst fully recognizing that it may well be that, by rules properly framed so as to extend to the Crown, the time within which an application for a certiorari by the Attorney-General may be made can be regulated and determined, this rule does not, in my judgment, apply to such an application for certiorari.

On this ground I am of opinion that the order below was wrong and the appeal should be allowed.

BRAY J. I agree. I think the first point made by the Attorney-General is good. He says that, according to the true construction of r. 21, the limit of time does not apply to a writ issued on the application of the Attorney-General. Now the first rule of construction is to construe the language according to its natural meaning, looking, of course, at the whole of the rule. This rule is so framed that, if we give it its natural construction, the Attorney-General must be bound by the second portion as well as the first, and that is admitted to be impossible. We can only make it read as Mr. Ryde asks us to read it, by the insertion of some such words as Swinfen Eady L.J. has suggested. On the other hand, if the Attorney-General is not included in the first part of the rule, the whole rule reads perfectly without any difficulty whatever. Now, of course, there are occasions when we are justified in looking at the intention of the Legislature or of those who framed a rule, and in departing from the natural construction; but when we look at this rule, so far from seeing that it was the intention to put this limit on the Attorney-General which did not exist before, it seems to me to be quite plain that it could not have been the intention. Between 1740, when the Act of 13 Geo. 2 was passed, and the passing of the Rules of 1886, for 146 years this limit of time has been held never to apply to the Attorney-General. In 1906 the Committee passed a rule which is in the same terms as the former rule, and is also identical, or nearly identical, with the words of the section in the Act of 1740. That, to my mind, instead of pointing to an intention to alter the law,

C. A. 1915

REX v. AMENDT.

points to an intention to continue it. On these grounds I think the Attorney-General is right and that the appeal must succeed.

Appeal allowed.

Solicitor for the Crown: *The Solicitor of Customs and Excise.*
Solicitor for respondent: *E. Moore.*

J. H. W.

1915
March 10, 11, 15.

BARNARD *v.* FOSTER.

[1914 B. 4058.]

Stock Exchange—Stockbroker and Client—Purchase of Shares for Particular Settlement—Power of Stock Exchange Committee to postpone Settlement—"Realise any security"—Courts (Emergency Powers) Act, 1914 (4 *& 5 Geo.* 5, *c.* 78), *s.* 1, *sub-s.* 1 (*b*).

Rule 20 of the Rules of the London Stock Exchange, which provides that the Stock Exchange Committee, on complying with certain formalities, "may dispense with the strict enforcement of any of the rules or regulations," does not empower the Committee to make any rule or regulation altering the date for the completion of a contract.

In July, 1914, the plaintiff, a stockbroker on the London Stock Exchange, bought from a jobber certain shares on the instructions of the defendant. The plaintiff paid the jobber for the shares, but as the defendant declined to take delivery and pay for them at the settlement in November, 1914, the plaintiff sold them:—

Held, that the shares were not a "security" within the meaning of that term in s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, as they never belonged to the defendant, and therefore that the plaintiff was entitled to sell them without applying to the Court under that statute.

ACTION tried by Sankey J. in the Commercial Court.

The plaintiff, who was a stockbroker on the London Stock Exchange, claimed 142*l.* 19*s.* 8*d.* from the defendant in connection with the purchase and sale of certain shares, and for interest.

On July 30, 1914, the plaintiff, on the instructions of the defendant, bought, subject to the rules and regulations of the Committee of the Stock Exchange, 100 Canadian-Pacific shares at 165½ from P. S. Coombe & Co., jobbers, for the mid-August account, which had previously been fixed by the Stock Exchange

1915

BARNARD v. FOSTER.

Committee for August 13. On July 31 the Stock Exchange Committee, purporting to act under rule 20 of the Stock Exchange Rules, which provides that "The Committee may dispense with the strict enforcement of any of the rules and regulations," on complying with certain formalities, passed a resolution "that bargains open for the ordinary mid-August account be settled at the date fixed for the end-August account, namely, Thursday, August 27." On August 6 the moratorium proclamation issued under the Postponement of Payments Act, 1914, came into force, by which it was declared that payments in respect of any contract made before the date of the proclamation were postponed, but, if not otherwise carrying interest, that they should, if specific demand was made for payment and payment was refused, carry interest as from the date on which they became due and payable at the Bank of England rate current on August 7, 1914: that rate was 6 per cent. On August 11 the plaintiff wrote to the defendant making specific demand for payment on or before August 13, and stating that if payment was refused the 6 per cent. rate of interest would come into effect; the letter concluded as follows: "We make to deliver you 100 Canadian-Pacific shares," words which Sankey J. held to mean "I am in a position to deliver you the shares and intend to do so." On the same day the jobbers from whom the shares were bought wrote a similar letter to the plaintiff. Further resolutions were passed by the Stock Exchange Committee on August 12, September 4, and October 2, by which the settlement of bargains was further postponed till November 18. On November 11 and again on November 19 the plaintiff gave notice to the defendant requiring him to take up the shares and stating that unless he did so by November 21 they would be sold. As the defendant did not take up the shares, the plaintiff sold the same, and now sued the defendant to recover (1.) the difference in price between the shares as bought by him from the jobbers and the price as sold, and (2.) interest since August 13 at 6 per cent.

Gore-Browne, K.C., and *A. Neilson*, for the plaintiff. The date fixed for completion of the contract, namely, August 13, was a vital term of the contract, and the Stock Exchange Committee

1915

BARNARD v. FOSTER.

had no power to alter it by any resolution they purported to pass: see *Union Corporation* v. *Charrington* (1) and *Benjamin* v. *Barnett.* (2) But for the moratorium proclamation issued under the Postponement of Payments Act, 1914, the contract would have had to be performed on August 13, and the postponement of completion under the moratorium cast upon the defendant the liability to pay interest at the rate of 6 per cent.

D. M. Hogg, for the defendant. The contract was for the "mid-August account," and the Stock Exchange Committee had power to say when that should be settled: see observations of Bigham J. in *Union Corporation* v. *Charrington.* (3) Here, the Committee resolved that the settlement should be on November 18. No interest is therefore payable by the defendant. Even if it could be said that the contract was for completion on August 13, no interest is payable under the moratorium, as the shares were never delivered to the defendant, and therefore no debt was due from him. (4)

The sale of the shares by the plaintiff was wrongful. When they were taken up by him they became the defendant's property, although no doubt the plaintiff had a lien on them. They were held by him as security, and by the Courts (Emergency Powers) Act, 1914, it is provided that no person shall, without the leave of the Court, "realise any security." As the plaintiff wrongfully sold the shares he is liable in damages to the defendant, and it is submitted that the measure of damages is the highest price reached by the shares since the date of sale: see *Shepherd* v. *Johnson* (5); *Michael* v. *Hart* (6); *Aylward* v. *Lamotte.* (7) [*Williams* v. *Peel River Land and Mineral Co.* (8) and *Ellis* v. *Pond* (9) were also referred to.]

Gore-Browne, K.C., in reply. The property in the shares had not passed to the defendant when the plaintiff sold them; the

(1) (1902) 8 Com. Cas. 99.
(2) (1903) 8 Com. Cas. 244.
(3) 8 Com. Cas. at p. 102.
(4) It is not considered necessary to set out in detail the argument on the question of interest in view of the temporary operation of the proclamation, &c., under which interest was claimed.
(5) (1802) 2 East, 211.
(6) [1901] 2 K. B. 867.
(7) (1902) Cited in Schwabe and Branson's Law of the Stock Exchange, 2nd ed., p. 217.
(8) (1886) 55 L. T. 689.
(9) [1898] 1 Q. B. 426.

defendant was bound to put the plaintiff in funds before he was entitled to the shares: *Stock and Share Auction and Advance Co.* v. *Galmoye*. (1) The shares were therefore not held by the plaintiff as a "security" within the meaning of the Courts (Emergency Powers) Act, 1914. As the defendant failed to perform his bargain the plaintiff was entitled to sell the shares: *Lacey* v. *Hill, Scrimgeour's Claim*. (2)

Cur. adv. vult.

March 15. SANKEY J. read his judgment, which, after stating the facts, continued as follows: Three points were raised in the defence, namely, (1.) that the plaintiff was not entitled to sell as and when he did; (2.) that the price was not a reasonable one; (3.) that the defendant is not liable for the interest. Over and above that the defendant brings a counterclaim for damages, to which he alleges he is entitled by the plaintiff's wrongful sale.

I now deal with the points in order. First, as to the allegation that the plaintiff was not entitled to sell. The defendant contends that the scrip for the shares which the plaintiff received from the jobbers was a "security" within the meaning of the Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1 (*b*), and that the plaintiff was not entitled to realize it without applying to the Court, a course which he admittedly has not taken. In my view this contention fails. I do not think that the scrip was a "security" within the meaning of the sub-section. The scrip never at any time belonged to the defendant, for he never in fact paid, or was willing to pay, for it; neither did the defendant ever in fact give it to the plaintiff as a security for any purpose: see *Lacey* v. *Hill, Scrimgeour's Claim*. (2) The object of the Act, in my opinion, was to prevent a person to whom another party had given a security from realizing such security at a crisis for a ruinous price, and it does not apply to circumstances like the present. I am therefore of opinion that the plaintiff was entitled to sell the shares as and when he did.

As to the second point, that the plaintiff did not obtain a

(1) (1887) 3 Times L. R. 808. (2) (1873) L. R. 8 Ch. 921.

1915

BARNARD v. FOSTER.

Sankey J.

proper price. No witnesses were called for the defendant, and I accept the evidence of Mr. Coombe and Mr. Green and decide that the price obtained was a proper one.

As to the third point, that the plaintiff is not entitled to interest, Mr. Gore-Browne contends (*a*) that the contract fixed the completion for August 13 and that the Stock Exchange Committee could not alter that date; alternatively (*b*) that if the Stock Exchange Committee could alter the date and postpone the completion, they in fact only did it on terms, under one of which the defendant was liable to pay interest at the rate of 6 per cent.

On this last point two questions arise: (*a*) Was the contract for the mid-August account as Mr. Hogg alleges and consequently postponeable by the Stock Exchange Committee, or was it (*b*) for August 13 and not alterable by the Committee?

As to (*a*), I think the real bargain on July 30 was a contract for settlement for the mid-August account as then fixed by the Stock Exchange, that is, for settlement on August 13, and was not for settlement on any date that might thereafter be fixed by the Stock Exchange Committee. I find that the parties intended to contract and did contract to complete on August 13. On this, too, see rule 91, where bargains are said to be for the current account.

As to (*b*), I now start with the assumption that the contract was for completion on August 13. Had the Stock Exchange Committee power to postpone that date? Reliance is placed on rule 20, under which the Committee may dispense with the strict enforcement of any of its rules and regulations under certain conditions. I do not think that the Committee had power under that rule to postpone the completion of the purchase. The powers of the Committee are contained in rule 5 and subsequent rules, and may be broadly classed under two heads: (1.) the power to make rules and regulations as to its members; (2.) the power to make rules and regulations as to its mode of business. Rule 20 allows the Committee to dispense with the strict enforcement of the rules and regulations. It seems to me, therefore, that the Committee may prescribe the manner in which contracts may be entered into and the mode

in which they may be completed, but they have nothing to do with the terms of the contract itself. Where there is a sale of shares prompt and proper delivery is essential and is one of the vital terms of the contract. Yet if the defendant's contention is right the Committee are entitled to defeat this vital term by postponing the date of completion and equally are, I suppose, entitled to insist on completion at a date earlier than the parties agreed to. Between altering the vital term of the date and the vital term of the price I can see no logical difference. In my view the Committee have no power to make any rule or regulation to alter a contract, and rule 20, which gives them power to dispense with the strict enforcement of their own regulations, does not entitle them to make any such alteration. In this view I am following the opinion of Bigham J. in *Union Corporation* v. *Charrington* (1), which was followed in turn by Kennedy J. in *Benjamin* v. *Barnett*. (2)

I think the position is that the bargain stood for August 13, but that the moratorium stepped in to postpone it. Mr. Hogg then says the moratorium does not apply so as to make interest payable by his client. He contends that till delivery of the shares no payment became due and payable by his client, and that therefore the moratorium proclamation does not apply. I am of opinion that this arises from a misconception of the relationship existing between stockbroker and client. The contract between the stockbroker and client entitles the stockbroker to have money from the client so that the stockbroker may be put in funds to pay for the purchase effected by him: see *Stock and Share Auction and Advance Co.* v. *Galmoye*. (3) I think, therefore, there was a payment which was due and payable by the defendant to the plaintiff on or before August 13, and that the case does come within the moratorium proclamation so as to make interest payable.

Taking the above view of the facts and the law, it is not necessary for me to decide whether the Stock Exchange proclamations did oblige the defendant to pay interest, and,

(1) 8 Com. Cas. 99. (2) 8 Com. Cas. 244.
(3) 3 Times L. R. 808.

1915

BARNARD v. FOSTER.

further, the counter-claim fails, because I hold that the plaintiff had a right to sell as and when he did.

The result is there must be judgment for the plaintiff for the amount claimed.

Judgment for plaintiff.

Solicitors for plaintiff: *Morley, Shirreff & Co.*
Solicitors for defendant: *Timbrell & Deighton.*

J. S. H.

1915

Jan. 19, 21.

DIXON *v.* BROWN.

County Court—Practice—Claim for Damages not exceeding 20*l. and for Injunction—Claim for Injunction withdrawn—Appeal without Leave against Judgment for Damages—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

By the proviso contained in s. 120 of the County Courts Act, 1888, "there shall be no appeal in any action of . . . . tort . . . . where the . . . . damage claimed does not exceed twenty pounds . . . . unless the judge . . . . shall grant leave to appeal."

In an action for trespass in the county court the plaintiff claimed 20*l.* damages for trespass and a mandatory injunction. At the trial the county court judge intimated, in effect, that he thought there had been a trespass, but he did not wish to put the defendant to the expense of a mandatory injunction if it could be avoided. The plaintiff thereupon abandoned his claim to the injunction. The county court judge having given judgment for the plaintiff for 15*l.* damages for the trespass:—

Held, that the plaintiff, having claimed the injunction in addition to the 20*l.* damages, might appeal from the judgment without first obtaining the leave of the county court judge notwithstanding the provisions of the section.

APPEAL from a judgment of the judge of the Lancashire County Court. The particulars of the plaintiff's claim stated that the plaintiff claimed 20*l.* damages for trespass to a party wall belonging to the plaintiff by the defendant having wrongfully entered upon the plaintiff's premises and erected a building upon the party wall, and a mandatory injunction to compel the defendant to remove the building.

At the trial in the county court the judge intimated that he

thought a trespass had been committed by the erection of the building, but that he never granted mandatory injunctions if he could help it, and that he did not propose to grant an injunction at present, but to adjourn the case, as he did not wish to put the defendant to the expense of a mandatory injunction, and it was possible that the parties might come to some reasonable understanding. The plaintiff thereupon withdrew the claim for the injunction. At the subsequent hearing the judge gave judgment for the plaintiff for 15*l.* damages for the trespass with costs and refused to give the defendant any costs arising out of the claim for the injunction upon the ground that the plaintiff had not failed upon that claim, but had withdrawn it at the hearing at the suggestion of the Court.

The defendant appealed without having obtained leave of the judge to do so.

Wingate-Saul, for the plaintiff, took the preliminary objection that no appeal would lie without leave of the judge. By s. 120 of the County Courts Act, 1888 (1), no appeal lies from the decision of a county court judge without the leave of the judge in any action of contract or tort when the debt or damages claimed does not exceed 20*l.* An injunction is a remedy and not a cause of action. It is therefore part of the action for damages. The claim for the mandatory injunction having been abandoned at the hearing, the claim was merely a claim for damages for trespass not exceeding 20*l.* In *Brune* v. *James* (2)

(1) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120: "If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior Courts to the High Court; Provided always, that there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed twenty pounds . . . . unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal."

(2) [1898] 1 Q. B. 417.

1915

DIXON v. BROWN.

the Court drew a distinction between an injunction which is a remedy and a debt or damages which constitute a cause of action.

A. Neilson, for the defendant. The claim made by the plaintiff is the test in all cases. The whole of the claim the plaintiff makes in the plaint note is the test. The injunction was part of the plaintiff's claim, and the fact that he abandoned that part at the hearing at the suggestion of the judge makes no difference. Under s. 120 of the County Courts Act, 1888, an appeal is given in every case except where it is limited by the proviso.

The COURT (Ridley and Bray JJ.) overruled the objection, holding that the proviso to s. 120 of the County Courts Act, 1888, does not apply where there is a claim for an injunction. The proviso only applies where the claim is solely for debt or damages and the claim does not exceed 20*l.*

The appeal was then heard on the merits and a new trial ordered.

Solicitors for plaintiff: *Rawle, Johnstone & Co., for Whiteside & Knowles, Morecambe.*

Solicitor for defendant: *W. Ellen, for Richard Knight, Morecambe.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1915
March 3.

METROPOLITAN WATER BOARD *v.* LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY.

London—Water—Metropolitan Water Board—Compulsory Powers—Laying Water Mains—Protection of Railway Company—Acquisition of Easement—Metropolitan Water Board (Various Powers) Act, 1907 (7 *Edw.* 7, *c. clxxiv.*), *ss.* 19, 21, 61, 96.

By s. 61, sub-s. 1, of the Metropolitan Water Board (Various Powers) Act, 1907, the Board are empowered to exercise at any place within their limits of supply the like powers with respect to the laying of mains and pipes as are exercisable by local authorities under the provisions of the Public Health Act, 1875, with respect to the laying of mains and pipes within their respective districts for the purpose of water supply. By sub-s. 3 the limits of supply are to be deemed the district of the Board.

By s. 96, sub-s. 6, of the Act of 1907—a section for the protection of certain named railway companies—the Board shall not, without the consent in writing of the railway companies under their common seal, acquire any of the lands or property of the railway companies, but the Board may acquire and the railway companies shall if required grant to the Board an easement or right of constructing and maintaining works on, through, in, under, over or along such lands and property; and the sum to be paid for the acquisition of such easement or right shall be settled as therein provided.

Under ss. 16 and 54 of the Public Health Act of 1875 a local authority supplying water within their district may carry water mains through any land on giving notice to the owner, subject to the payment of compensation under s. 308.

The Board having laid a water main under land of one of the named railway companies within the limits of supply of the Board:—

Held, that the Board were not bound to acquire or pay for any easement or right of constructing or maintaining the main, but were entitled under s. 61 of the Act of 1907 to exercise the powers of local authorities as to the carrying of water mains through lands without acquiring an easement.

Decision of Shearman J. [1914] 3 K. B. 787 affirmed.

Appeal from the judgment of Shearman J. upon an award in the form of a special case; reported [1914] 3 K. B. 787.

The Metropolitan Water Board, hereinafter called the Board, were minded under certain enabling sections of the Public Health Act, 1875, and the Metropolitan Water Board (Various Powers)

C. A. 1915

METROPOLITAN WATER BOARD v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY.

Act, 1907 (1), to lay a main pipe under certain lands at Battersea belonging to the London, Brighton and South Coast Railway Company, hereinafter called the company. The Board duly gave notice of their intention to the company. The company gave notice to the Board that under s. 96, sub-s. 6, of the Metropolitan Water Board (Various Powers) Act, 1907, the Board were bound to acquire an easement in the company's lands. The Board claimed that under s. 61 of the Act of 1907 and the powers conferred upon them by the Public Health Act, 1875, they were entitled to carry out the works without purchasing or acquiring any easement or right of constructing the works, and they refused to admit the validity of the company's notice.

Sect. 96 of the Metropolitan Water Board (Various Powers) Act, 1907, was passed for the protection of several railway companies of which the company is one. By sub-s. 15 of that section it is provided that any dispute or difference which may arise between the railway companies and the Board as to any work to be carried out by the Board shall be settled by arbitration as therein provided.

The proposed works were carried out with the consent of the company subject to a reference to arbitration under the above enactment.

By an agreement under seal dated October 16, 1913, and made between the Board of the one part and the company of the other part, it was agreed that the following matter should be referred to arbitration, namely, whether the Board were entitled under the powers conferred upon them by the Metropolitan Water Board (Various Powers) Act, 1907, to lay the main through and under the said lands of the company without purchasing or acquiring from the company any easement or right of constructing or maintaining works on, through, in, under or along such lands and property. It was further agreed that the arbitrator should state his award in the form of a special case for the opinion of the Court and that in all other respects the reference should be

(1) The relevant sections of the Metropolitan Water Board (Various Powers) Act, 1907, and the Public Health Act, 1875, are set out in the judgment of Swinfen Eady L.J., and also in the report of the case in the Court below.

subject to the Arbitration Act, 1889, as a submission made by consent out of Court.

There were produced before the arbitrator the Metropolitan Water Board (Various Powers) Act, 1907, the book of reference of the said Act, and the plan of the proposed works, all of which, together with the submission to arbitration, were annexed to and to be deemed part of the special case.

The company contended that the provisions of s. 96, sub-s. 6, of the Metropolitan Water Board (Various Powers) Act, 1907, extended and applied to the laying by the Board of the main and the execution by the Board of the works shown upon the plans, specifications, sections, and detailed drawings delivered with and referred to in their notice and purporting to be so laid and executed by the Board under s. 61 of that Act.

The Board contended (1.) that s. 96, sub-s. 6, of the Act had reference only to lands delineated on the deposited plans and described in the deposited book of reference which the Board were empowered to enter upon, take, and use under s. 19 of the Act for the purposes of Part II. of the Act, and which included certain lands of the company other than the lands at Battersea now in question and shown on the plan annexed to the submission; (2.) that s. 61 of the Act of 1907 conferred on the Board authority to exercise the powers of local authorities under the Public Health Act, 1875, ss. 54 and 16, with respect to the laying of mains and pipes within their limits of supply, and that the exercise of such powers did not involve the purchasing or acquiring by the Board of any of the lands affected (see *Swanston* v. *Twickenham Local Board* (1)) or any easement therein, but only the payments by way of indemnity and compensation specified in s. 96, sub-s. 5, of the Act of 1907 in lieu of the payment of the compensation specified in s. 308 of the Public Health Act, 1875; (3.) that the Board were therefore entitled under the powers conferred on them by the Act of 1907 to lay the main in question through and under the said lands of the company at Battersea without purchasing or acquiring from the company any easement or right of constructing and maintaining works on, through, in, under or along such lands and property inasmuch

(1) (1879) 11 Ch. D. 838, at p. 851, per Cotton L.J.

C. A. 1915

METROPOLITAN WATER BOARD v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY.

as (*a*) the lands of the company in or through which the main was laid were not and had not any connection with the lands of the company which the Board were empowered to acquire by s. 19 of the Act of 1907, nor were such lands at Battersea required or used for the purposes of the works authorized by Part II. of the Act in s. 19 thereof referred to, and (*b*) the Board had no power to compulsorily purchase or acquire the company's lands at Battersea.

The award proceeded to recite as follows:—It was admitted by the parties that all the requirements of the Act other than the alleged requirement as to the giving of a notice to acquire an easement had been carried out, and it was not suggested that the proposed works were more or other than were reasonably necessary for the laying of a main properly and safely in the position indicated and that the place where the main was to be laid was within the limits of supply of the Board. The acquisition of lands is dealt with by various sections of the Act. In particular power is given to the Board by s. 19 to take and use lands described in the book of reference. In s. 21 power is given to the Board in lieu of acquiring any lands to acquire an easement. By s. 24 compulsory purchase or taking of lands or easements is limited to a period of three years from the passing of the Act. Some of the lands delineated in the book of reference both within and without the district of the Board belonged to the railway companies for whose protection s. 96 was passed. The powers given by s. 61 of the Act only apply within the limits of the supply of the Board and are not limited in time.

The arbitrator took the view that the powers given by s. 61 of the Act did not involve any change in the title of the land in which the pipes were laid, but merely gave the right to lay such pipes, and that if and when such pipes were removed the land on which they had been placed would belong to the original owner and not to the Board. For these and other reasons he was of opinion that the mere laying of a pipe or main within the district of the Board under the powers of s. 61 was not a purchase or acquisition of the land within the meaning of s. 96, sub-s. 6. He therefore awarded and declared as follows:—

"That the Board were entitled under the powers conferred on

them by the Metropolitan Water Board (Various Powers) Act, 1907, to lay the aforesaid main through and under the said lands of the company without purchasing or acquiring from the company any easement or right of constructing and maintaining works on, through, in, under or along such lands and property; but this award is subject to the opinion of the Court on the following point of law:—

"Whether the laying of mains or pipes under the powers of s. 61 of the said Act through or under the property of a railway company necessarily involves the purchase or acquisition of any of the lands or property of such railway company within the meaning of s. 96, sub-s. 6, of the said Act.

"If the answer of the Court to the said question is in the negative then this my award shall stand; but if the answer is in the affirmative then this my award shall be as follows:—

"That the Board were not entitled under the powers conferred on them by the Metropolitan Water Board (Various Powers) Act, 1907, to lay the aforesaid main through and under the said lands of the company without purchasing or acquiring from the company any easement or right of constructing or maintaining works on, through, in, under or along such lands and property . . . ."

Shearman J. held that the Board were not bound to acquire or pay for any easement or right of constructing or maintaining the main, and he confirmed the award.

The railway company appealed.

Ryde, *K.C.*, and *Hartree*, for the railway company. Sect. 19 of the Metropolitan Water Board (Various Powers) Act, 1907, gave the Metropolitan Water Board compulsory power to acquire such of the lands delineated on the deposited plans as they might require for the purposes of the works authorized by Part II. of the Act. Sect. 21 gave the Board compulsory power, in lieu of acquiring any lands for the purpose of laying conduits or lines of pipes, to acquire such easements and rights in such lands as they might require for the purpose of constructing, laying, maintaining, and repairing conduits or pipes, and to give notice to treat in respect of such easements and rights under the Lands Clauses Acts. Those compulsory powers were, by s. 24, to cease after the expiration

C. A. 1915

METROPOLITAN WATER BOARD v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY.

of three years from the passing of the Act. Sect. 61 gives the Board further powers. They may exercise at any place or places within their limits of supply the like powers with respect to the laying of mains and pipes as are exercisable by local authorities under the Public Health Act, 1875, with respect to the laying of mains and pipes within their districts for the purpose of water supply, including s. 308. The powers conferred by s. 61 are unlimited in point of time. Sect. 54 combined with s. 16 of the Act of 1875 empowers a local authority to carry their water mains into, through, or under any lands whatsoever within their district, subject to the payment of compensation under s. 308. They may do this without acquiring the land or an easement therein. Sect. 96 of the Act of 1907 is a section inserted for the protection of certain railway companies named therein. Sub-s. 6 provides that "notwithstanding anything contained in this Act or any Act incorporated wholly or partly therewith" the Board shall not, without the consent of the railway companies, purchase or acquire any of the lands or property of the railway companies, but the Board may acquire an easement or right of constructing and maintaining works in such lands and property. The effect of this sub-section is to qualify the exercise of the powers conferred by s. 61 in the case of the named railway companies by requiring the Water Board to acquire an easement before laying mains in the companies' lands. The Board are therefore bound to acquire an easement in the land and to pay compensation for the same under the Lands Clauses Acts, and they can acquire an easement though the three years limited by s. 24 for the compulsory purchase of or taking of lands or an easement has expired. Sub-s. 4 of s. 96 deals with the temporary interruption of traffic on the railways or to or from the stations, sidings, or works of the companies caused by the execution of the works of the Board in the railway companies' lands or property, and sub-s. 5 provides for compensation and enacts that in the case of the exercise by the Board of the powers of s. 61 of the Act "this sub-section shall apply instead of section 308 of the Public Health Act, 1875." This latter clause does not show that in the case of the named railway companies the Board have, by virtue of s. 61, all the powers which a local authority have for the laying of mains. The particular power of

laying water mains in the companies' land is expressly qualified by sub-s. 6. The compensation given by s. 96, sub-s. 5, is in respect of the execution of the works, and is therefore narrower than that given by s. 308 of the Act of 1875. It would not include compensation for the possible cost of diverting the water main under sub-s. 9 (which the railway must do at their own expense), if they subsequently wish to widen or reconstruct their line. The named railway companies would, therefore, if the Board can exercise in full the powers of s. 61, be worse off, by reason of this section which was passed for their protection, than they would be without it. Sect. 96, sub-s. 6, should not be construed as having that effect. Where general provisions in an Act are followed by a special protective clause the latter operates as an exception upon the former: *Taylor* v. *Oldham Corporation*. (1) Upon that principle this special protective clause, s. 96, sub-s. 6, is a limitation upon the powers of s. 61 in the case of the named railway companies. The clause must be construed against the promoters and in favour of the persons protected. Moreover, the laying of the main involves an acquisition of "lands or property" of the railway company. The mere fact of laying the main in the company's land under the powers conferred by s. 61 vests the space of land occupied by the main in the Board: *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted* (2); *Taylor* v. *Oldham Corporation*. (3) The result is that if not "land" at any rate "property" is acquired from the railway company without their consent, which is contrary to the express provisions of s. 96, sub-s. 6. Unless this is so, the word "property" is senseless. The Board must therefore acquire an easement in the land under that sub-section, and must proceed in accordance with and pay compensation under the Lands Clauses Acts.

Clavell Salter, K.C., and *Courthope-Munroe, K.C.*, for the Metropolitan Water Board, were not called upon.

SWINFEN EADY L.J. The question in this case is whether the Metropolitan Water Board, when laying a water main or pipe

(1) (1876) 4 Ch. D. 395, at p. 410. (2) [1907] 1 K. B. 490, at p. 499.
(3) 4 Ch. D. at p. 411.

C. A.
1915

METRO-POLITAN WATER BOARD v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY.

Swinfen Eady L.J.

within the lands of the London, Brighton and South Coast Railway Company, under the powers conferred upon them by the Metropolitan Water Board (Various Powers) Act, 1907, are bound to acquire an easement in the land, or whether without acquiring an easement they may exercise the statutory powers conferred on local authorities by the Public Health Act, 1875. The railway company contend that if the Metropolitan Water Board wish to lay a pipe in their lands they must acquire an easement, and must pursue the proper proceedings for obtaining an easement under s. 96, sub-s. 6, of the Act of 1907. On the other hand the Metropolitan Water Board contend that they have the statutory right of carrying their water mains and pipes through the railway company's land without acquiring any easement.

By s. 19 of the Act of 1907 the Metropolitan Water Board had power to acquire and take compulsorily certain lands shown on the deposited plans for the purposes of the works authorized by Part II. of the Act. By s. 21 the Board had power, in lieu of acquiring lands for the purpose of the conduits or lines of pipes authorized by Part II. of the Act, to acquire such easements and rights in such lands as they might require for the purpose of constructing, placing, laying, inspecting, maintaining, cleansing, repairing, conducting, managing, renewing or enlarging conduits or pipes; that is to say, they had power to take easements for the purpose of laying their conduits and pipes. Then there is a proviso at the end of s. 21: "Provided also that where the Board shall have acquired an easement or right of constructing or maintaining works upon the lands or property of any railway company, nothing in this Act shall prevent such railway company from using such lands or property for railway purposes subject to such reasonable protection for the works of the Board as may be agreed or settled by arbitration." Down to this point there is merely power in the Board to acquire lands or easements. Then comes s. 61, which provides: "(1.) It shall be lawful for the Board to exercise at any place or places within their limits of supply the like powers with respect to the laying of mains and pipes as are exercisable by local authorities under the provisions of the Public Health Act, 1875, with respect to the laying

of mains and pipes within their respective districts for the purpose of water supply (including section 308 of the said Act) . . . ." Sect. 308 is a section in the Public Health Act, 1875, providing for compensation: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers . . . ." Thus there is conferred on the Board the powers of laying mains and pipes exercisable by local authorities under the Public Health Act, 1875. Under the Act of 1875, by s. 54, where a local authority are empowered to supply water within their district, "they shall have the same powers and be subject to the same restrictions for carrying water mains within or without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force." So that the powers of the local authority with regard to water are conferred by reference to their powers with regard to sewage. By s. 16 they have large powers with regard to making and carrying sewers through lands: "Any local authority may carry any sewer through across or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriageway of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into through or under any lands whatsoever within their district . . . ." That confers upon the local authority power, without acquiring land or an easement in land, to carry their sewers and water mains, subject to the conditions specified in the section, into, through, or under any lands within their district. Turning back to the Act of 1907, sub-s. 3 of s. 61 goes on to provide that "for the purposes of this section the limits of supply shall be deemed to be the district of the Board, and the chief engineer of the Board shall be deemed to be the surveyor." The main in the present case is proposed to be laid within the limits of supply of the Water Board. Sub-s. 4 provides: "The powers by this section conferred shall be in addition to and shall not be

C. A. 1915

METROPOLITAN WATER BOARD v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY.

Swinfen Eady L.J.

construed so as to limit derogate from or otherwise affect any other powers vested in the Board under this Act." Those being the general provisions enabling the Metropolitan Water Board to carry their mains and pipes for water in that way, s. 96 is inserted for the protection of the railway companies named therein. We are told that there are two other companies within the limits of the Water Board's supply which are not specifically mentioned, namely, the Metropolitan and the Metropolitan District Railway Companies. Sect. 96 contains various clauses for the protection of the railway companies. Sub-ss. 1 to 5 provide for the construction and laying down of conduits, mains, pipes and other works upon, along, across, under, or over the railways, works, lands or property of the companies. By sub-ss. 1 to 3 all such works are to be carried out under the superintendence and to the reasonable satisfaction of the chief engineer of the railway company, and in accordance with plans submitted to and approved of in writing by him; and the Board shall make good and restore to the reasonable satisfaction of the engineer any property or works of the railway companies affected by such works; and the works are to be carried out by the Board at such times and in such manner as the engineer may reasonably direct. In other words, those sub-sections contain general provisions whereby the railway companies are protected both as to the time and manner of the works being done under the supervision of their engineer. By sub-s. 4 it is provided: "In the execution of any such works or incidental matters the Board shall not at any time or in any manner cause any injury or danger or (so far as can be avoided) any interruption impediment or delay to the safe passage and conduct of traffic over the railways, or at to or from the stations sidings or works of the railway companies." That is to say, they are not to injure or endanger the traffic, and so far as can be avoided they are not to interrupt, impede, or delay it. Sub-s. 5 provides for compensation to the railway company for any such injury, danger, interruption, impediment or delay, and contains a proviso whereby the provision thereby made is substituted for the provision in s. 308 of the Public Health Act, 1875. Sub-s. 6, which is the sub-section upon which the railway company base their contention, provides that, "Notwithstanding anything

contained in this Act or any Act incorporated wholly or partly therewith, the Board shall not without the consent in writing of the railway companies under their common seal purchase or acquire any of the lands or property of the railway companies but the Board may acquire and the railway companies shall if required grant to the Board an easement or right of constructing and maintaining works on through in under over or along such lands and property, and the sum to be paid for the acquisition of such easement or right shall be settled in the manner provided by the Lands Clauses Consolidation Act, 1845 . . . ." Then sub-s. 9, stated shortly, empowers the railway companies at any future time for the purposes of their railways to change the position of the mains and pipes of the Water Board for another position, but they are to do it at their own expense.

The question is whether on the true construction of this Act the Board are entitled to lay their pipes in and through the lands of the specified railway companies without acquiring an easement. In the first place there is general power enabling them to do so. Under s. 61 they have all the powers of local authorities with respect to the laying of mains and pipes. If that were all, it could not be disputed that the Board would have the right under this Act to carry their mains and pipes through the railway companies' lands. It is said, however, that s. 96, sub-s. 6, according to its true construction, read with sub-ss. 4 and 5, limits the power of the Board. The contention is that, if the Board carry a water pipe through land, the pipe when in position, together with the space it occupies, becomes vested in them. The local authority become, by virtue of s. 13, the owners of a sewer laid by them in lands under s. 16 of the Public Health Act, 1875. It is said that a water main is in this respect in the same position as a sewer; that the Board would by laying the main in the land acquire part of the property of the railway company; and that, as there is a provision in sub-s. 6 that the Board shall not without the consent of the railway companies acquire any of their lands or property, it follows that they cannot carry the main through any part of the property of the railway companies without acquiring an easement, because that would be a method of acquiring lands

C. A. 1915

METROPOLITAN WATER BOARD v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY.

Swinfen Eady L.J.

or property of the railway companies without their consent. In my opinion this contention is not well founded. I think it is manifest from the terms of the Act that there is conferred on the Board the power not only of acquiring easements, but the power conferred on local authorities of carrying water mains through lands without acquiring easements. In terms it is conferred by s. 61. Sect. 96, sub-s. 5, contemplates that the Board have that power, because the proviso at the end of that sub-section is this: "Provided that in the case of the exercise by the Board of the powers of" s. 61 "this sub-section shall apply instead of section 308 of the Public Health Act, 1875." In other words, with regard to these particular railway companies' lands there is in that section, which was inserted for the protection of the railway companies, a recognition that the Board have the statutory powers in and over the lands of the railway companies conferred by s. 61 without acquiring any land or easement.

In my opinion there is no foundation for the contention that the Water Board are bound to acquire an easement for laying their mains and pipes. There is nothing in the Act of 1907 requiring them to do so. On the contrary, s. 61 gives express general powers of carrying water mains and pipes through lands without acquiring an easement, and in the special section dealing with the named railway companies there is a recognition that those statutory powers may be exercised with regard to the railway lands.

For these reasons I am of the opinion that the judgment of the Court below is right, and the appeal therefore fails.

BANKES L.J. I agree. The only question which we have to decide is as to the true construction of sub-s. 6 of s. 96 of the Metropolitan Water Board (Various Powers) Act, 1907. For the purpose of construing that sub-section it is necessary to consider a number of other sections in the Act. On the face of it that sub-section is confined merely to a limitation upon the right of the Board to purchase or acquire lands compulsorily, and the limitation is to the extent that they shall not purchase or acquire lands without the consent of the company, but they may in place thereof acquire an easement. The railway company seek to read

something into that sub-section which is not there. They seek to read the sub-section as if it said that the Board shall not without the consent of the railway companies purchase or acquire any of the lands or property of the companies, but may acquire an easement, and shall not exercise any of the powers of laying mains or pipes conferred by s. 61 of the Act and the Public Health Act, 1875. Two arguments have been addressed to us to show that the sub-section should be read as though these latter words were there. One, as I understand it, is that s. 61, which incorporates the powers conferred upon local authorities by the Public Health Act, 1875, with regard to laying mains and pipes, expressly includes the right under s. 308 of receiving certain compensation in the event of damage being done; that these railway companies in a section inserted for their own protection have substituted for the compensation provided by s. 308 something which gives them a much smaller right to compensation than they would have had under s. 308; that the railway companies would not have been so foolish as to obtain the insertion of such a provision in the Act unless the Act had provided that the powers conferred by s. 61 were restricted; and that therefore s. 96, sub-s. 6, ought to be construed, as it is said it is capable of being construed, in accordance with the railway company's contention. I am not prepared to say that the right to compensation is much narrower. It may well be that if it is narrower the railway companies thought they had secured compensation in a different form in some of the other sub-sections of that section. It is not, as it seems to me, necessary to decide that, because it is an argument which cannot avail to induce the Court to construe sub-s. 6 in the way suggested. The other argument is this. It is said that, by analogy to the laying of a sewer by a local authority, the laying of a water main or pipe under ss. 54 and 16 of the Public Health Act, 1875, and s. 61 of the Act of 1907 confers on the Water Board a property in the land occupied by the main or pipe; and that therefore the words in sub-s. 6, "shall not . . . . purchase or acquire any of the lands or property of the railway companies," must be read as including the laying of mains or pipes under the Public Health Act. The answer to that, as it seems to me, is this, that when the Public Health Act, 1875, intends that

C. A. 1915

METROPOLITAN WATER BOARD v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY.

Bankes L.J.

this statutory power of laying mains or pipes shall confer a right in the property or land in which they are laid it says so. Sect. 13 of the Act expressly vests all sewers in the district in the local authority, and that has been construed to confer a freehold interest in the land. There is no similar provision with regard to a water pipe, and in my opinion there is no authority for saying that the mere exercise of a statutory right with regard to a water pipe confers any property in the land in which the pipe is laid.

For these reasons in my opinion both arguments fail, and it is not possible to put the construction on s. 96, sub-s. 6, that is contended for.

BRAY J. I am of the same opinion. The contention of the railway company is that before the Water Board can exercise any of the powers conferred by ss. 54 and 16 of the Public Health Act, 1875, with regard to the laying of mains or pipes in, through, or under any land of one of the named railway companies, they are bound to acquire and pay for an easement under the Lands Clauses Act, 1845. That it was not the intention of the Legislature to take away with regard to railway lands the powers given to the Board by the Public Health Act, 1875, is clear, because the power is specially mentioned and the procedure to be adopted in order to obtain compensation is provided for by s. 96, sub-s. 5. The first five sub-sections of that section are limitations upon the mode of exercising the powers of the Board in the execution of the works. They have to carry out the works under supervision, and there are other provisions quite proper in the case of the special property that the railway companies have, and the very large interests they have in seeing that their land is not unduly interfered with. Coming to the construction of sub-s. 6, I understand the contention is this, that when it says the Board "shall not without the consent in writing of the railway companies under their common seal purchase or acquire any of the lands or property of the railway companies," it prohibits the Board from exercising any of the powers under the Public Health Act, 1875, unless they acquire an easement under the subsequent words of the sub-section. The argument is based, as I understand,

upon the contention that the word "property" includes that very small portion of land which has to be excavated when the pipes are laid. I do not think that the word "property" has that meaning. For some reason which I do not understand—I daresay there is a good reason for it—when dealing with the lands of railway companies the Act calls them "lands and property." That appears more particularly from the last proviso in s. 21. Having dealt with lands and calling them lands throughout, the section then says: "Provided also that where the Board shall have acquired an easement or right of constructing or maintaining works upon the lands or property of any railway company nothing in this Act shall prevent such railway company from using such lands or property for railway purposes." I am satisfied that the word "property" in s. 96, sub-s. 6, does not include the small interest, whatever it may be, which the Board acquire in the land when they lay a pipe in it. If that is so, it seems to me that the contention fails, because the pipe can be laid without the consent of the railway company, and it is unnecessary for the Board to exercise the power given to them by the words "but the Board may acquire and the railway companies shall if required grant to the Board an easement." On these grounds it seems to me the contention of the railway company fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for railway company: *P. Vivian Rose.*
Solicitor for Water Board: *Walter Moon.*

W. F. B.

1915
March 18.

MERSEY DOCKS AND HARBOUR BOARD *v.* BIRKENHEAD CORPORATION.

Rates—General District Rate—Occupation of Land—"Land covered with water"—Graving Docks—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

Graving docks used for the examining and repairing of ships, and into which water is usually admitted only when it is necessary to float ships into or out of them, are not "land covered with water" within the meaning of that expression in s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875.

Where land is sometimes covered with water for the purposes of its use, and sometimes not, it is a question of degree whether, having regard to the land and its use, it can be said to be "land covered with water" within the meaning of the section or not.

Special Case stated by an arbitrator for the opinion of the Court.

In an arbitration as to the valuation of the dock estate of the Mersey Docks and Harbour Board situate in Birkenhead for the purpose of assessment, a question arose as to whether certain graving docks with their entrances were rateable at one fourth part only of their net annual value, as being "land covered with water" within s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. (1)

The arbitrator found the following facts. The graving docks were excavations with walls, quays, and gates having direct access to the adjoining Birkenhead Docks, of which they formed part. They were used for the examining and repairing of ships. Ships were floated into them, the gates at the entrance were then closed, and the water was then pumped out. After the examination or repair of the ship was carried out the water was readmitted to the dock and the ship was floated out. The water was then generally, but not always, pumped out again, and the dock left dry until such time as water was again required to float vessels

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (*b*): ". . . . The occupier of any land covered with water . . . . shall be assessed in respect of the same in the proportion of one fourth part only of such net annual value thereof."

into it. On some occasions the next vessel on turn was floated into the dock on the same water. For the purpose of enabling the graving docks to be so used it was necessary for them to be full of water to enable ships to be floated in and out. While the repairs of a ship were in progress, or while for any other reason it was necessary to keep down the water in the dock which gained access by percolation or by leakage through the gates, the water was kept down by pumping. Each graving dock was approached from the Birkenhead Docks by an entrance which was always covered with water up to the dock gate.

On behalf of the Mersey Docks and Harbour Board it was contended that the graving docks with their entrances were "land covered with water" within s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, it being necessary for their beneficial occupation that there should be water covering the land.

On behalf of the Birkenhead Corporation it was contended that the graving docks were used as engineers' or shipbuilding yards, that water was only temporarily used for the purpose of floating vessels in or out in order to facilitate such user, and the graving docks were in no sense "land covered with water."

The arbitrator was of opinion that the graving docks with their entrances were not "land covered with water," and were consequently assessable at their full value, and not at one quarter of such value, and he so awarded.

The question for the opinion of the Court was whether the arbitrator's award was right.

Maurice Hill, K.C., and *W. J. Lias*, for the Mersey Docks and Harbour Board. Graving docks cannot be beneficially used unless they are sometimes covered with water, the presence of water being essential when ships enter or leave the docks. They therefore come within the principle laid down by Lord Alverstone C.J. in *Smith's Dock Co.* v. *Tynemouth Corporation* (1), where he said (p. 956) that the words "land covered with water" in the section in question "must include any case where the presence of water over the land is essential to the beneficial occupation of the land for the purpose for which it is occupied."

(1) [1908] 1 K. B. 948.

1915

MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD CORPORATION.

In that case land which had been excavated, and over which pontoons, used in connection with the repair of ships, floated, was held to be "land covered with water." Apart from the presence of water the graving docks would be useless holes in the ground. In *East London Waterworks Co.* v. *Leyton Sewer Authority* (1) it was held that filter beds were "land covered with water" although they were not always covered with water. In that case Cockburn C.J., referring to the filter beds, said: "They are intended to hold water, though they do not at all times hold water." That observation is precisely in point as to graving docks, and would apply also to tidal basins and hards in the Thames which when the tide is out can be used in the same way as graving docks are used. Furthermore, the graving docks are constructed as accessories to the wet docks and should be rated on the same footing as they are: see *Reg.* v. *Neath Overseers.* (2) [*Lancashire and Yorkshire Railway* v. *Liverpool Corporation* (3) was also referred to.]

As it is not clear from the award whether the arbitrator has not treated the entrances as part of the graving docks, whereas they are in reality part of the wet docks, being always covered with water, the case should in any event be sent back to have this made clear.

Ryde, K.C., and *A. H. Maxwell*, for Birkenhead Corporation, assented to the case going back for the arbitrator to deal with the suggested ambiguity in the award, but were not called upon to argue.

SCRUTTON J. The question raised by this case is whether what is popularly called a dry dock is "land covered with water" within the meaning of that expression in s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. The question arises as to certain docks, called graving docks, on the Birkenhead side of the Mersey, and I am told that, owing to some agreement, the question has not yet arisen on the Liverpool side of the river.

The case finds, and it is fairly well known, what a graving dock is. As it is sometimes necessary to effect repairs to a ship

(1) (1871) L. R. 6 Q. B. 669. (2) (1871) L. R. 6 Q. B. 707.
(3) [1915] A. C. 152.

under her water line, and as this cannot be effected while she is in the water, she is put into the graving dock to enable the repairs to be carried out. The graving dock is an excavation in the ground which can be pumped dry. To get the ship into this excavation or graving dock there must be water in it, and, accordingly, there are gates at its entrance through which the water is admitted and the ship floats in; the water is then pumped out, and the ship, resting on blocks in the dry dock, can then be repaired. When the repairs are finished, water is let in again and she is floated out. There is a very elaborate system of pumping for getting the dock, which is now said to be "land covered with water," free from the water which is supposed to cover it.

As I have said, the question arises on s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, which gives the occupier of any "land covered with water" the right to have it assessed in the proportion of one fourth part only of its net annual value. In this case the arbitrator has treated the graving docks as not being "land covered with water," and therefore held the Mersey Docks and Harbour Board to be assessable at the full value of the docks and not at one fourth part only of their value. On the construction of the sub-section I should have said that where land is sometimes covered with water for the purposes of its use and sometimes not it is a question of degree whether, looking at the land and its use, one would say substantially that it was land covered with water or not. If it were found that in the course of a year the land was covered with water for a week, and not covered with water for the rest of the year, one would probably say that it was not "land covered with water" within the meaning of the sub-section; if, on the other hand, it was generally covered with water and not covered for one week out of the year, one would probably say that it was "land covered with water."

Two cases have been cited to me which deal with the point. In *Smith's Dock Co.* v. *Tynemouth Corporation* (1), where the question arose as to a pontoon which could be raised or depressed above an excavation in which there was water, and on which ships could be placed for the purpose of repair, Lord Alverstone C.J.

(1) [1908] 1 K. B. 948.

1915

MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD CORPORATION.

Scrutton J.

said "in my opinion the words must include any case where the presence of water over the land is essential to the beneficial occupation of the land for the purpose for which it is occupied." Finding that the water had to be there for the purposes of the floating pontoon being used, the Court held that the excavated ground over which the pontoon floated was "land covered with water" and was assessable on that footing. The other case, *East London Waterworks Co.* v. *Leyton Sewer Authority* (1), related to some filter beds which were sometimes covered with water and sometimes not. Cockburn C.J. said that "the only use of these filter beds is to contain water for the purpose of being filtered; and if some sections are left dry while others are covered with water, that is only a part of the filtering process." In the same case Blackburn J. said "whether the land was or was not covered with water, the use of it was to hold the water, and in effect it is permanently covered with water." The Court there held that the filter beds were "land covered with water." I agree, however, with what Blackburn J. also said in his judgment, that the question is one of degree.

The main purpose for which graving docks are used is that ships may be repaired while free from water. They are called dry docks because, generally, there is no water in them; indeed, it is essential for the purpose of repairing ships that they should be free from water. The presence of water is only essential during the short time while ships are being brought into or taken out of the dock. Except during those times the dock is a dry dock. It is unnecessary for me to discuss what may be the case as to tidal basins or the hards in the Thames which are very similar to tidal basins. In this case I am satisfied that the arbitrator was right in holding that having regard to the extent to which the land in question is dry and to the extent to which it is covered with water, and having regard to its general use, it is not "land covered with water." The award in its main findings is therefore right. It is not, however, quite clear from the award whether or not the arbitrator treated the entrances to the graving docks as land covered with water. It seems clear that the entrances are part of the wet dock and are, just as the wet dock is, "land covered with

(1) L. R. 6 Q. B. 669.

water." The dry docks plus the lock gates are not "land covered with water," and the entrances are "land covered with water." The award must therefore go back to the arbitrator for him to consider the effect of my findings and to say whether, in view of them, he desires to alter any of his figures.

1915

MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD CORPORATION.

Case remitted.

Solicitors for Mersey Docks and Harbour Board: *Rawle, Johnstone & Co., for W. C. Thorne, Liverpool.*

Solicitors for Birkenhead Corporation: *F. Venn & Co., for J. Fearnley, Town Clerk, Birkenhead.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.

1915

Feb. 9.

In re SILBER.

War—Bankruptcy—Petition—Leave to present—Stay of Proceedings—Power of Courts to defer Execution—Courts (Emergency Powers) Act, 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1, *sub-ss.* 1 (*a*), 3.

Sect. 1, sub-s. 3, of the Courts (Emergency Powers) Act, 1914, which provides that, where a bankruptcy petition has been presented and the debtor proves to the satisfaction of the Bankruptcy Court that his inability to pay is due to the present war, the Court may at any time stay proceedings under the petition, is exhaustive and not limited to petitions presented before the passing of the Act. It is not necessary therefore under s. 1, sub-s. 1, for an unsatisfied judgment creditor, before he can present a bankruptcy petition against the debtor, to obtain the leave of the Court by which the judgment was entered.

APPEAL from a decision of the registrar.

On May 14, 1914, the petitioning creditors commenced an action in the King's Bench Division against the debtor to recover the sum of 85,790*l.* On June 26, 1914, Master Archibald gave liberty to defend on giving security for 60,000*l.* On July 6, 1914, Scrutton J. varied that order and gave leave to sign judgment for 61,320*l.*, and leave to defend as to the residue of the claim, and judgment was, on the same day, signed for 61,320*l.* On July 8 a bankruptcy notice was issued, and on July 16 was served upon the debtor for the amount of the

C. A. 1915

SILBER, *In re.*

judgment debt. On July 24, the defendant not having satisfied the judgment, the act of bankruptcy was complete. On July 27 the Court of Appeal affirmed the decision of Scrutton J.

On October 22 a bankruptcy petition was presented against the debtor, and on January 7, 1915, the debtor gave notice to dispute the petition and the making of a receiving order on the ground (inter alia) that the petitioning creditors had not complied with the requirements of the Act (4 & 5 Geo. 5, c. 78), and were therefore not entitled to present the petition.

On January 14 the registrar held that sub-s. 3 was exhaustive as to bankruptcy petitions, and that sub-s. 1 did not apply, and he made a receiving order. The debtor now appealed on the ground that under s. 1, sub-s. 1 (*a*), of the Courts (Emergency Powers) Act, 1914, the petition ought not to have been presented without the leave of the Court by which the judgment was entered. Sect. 1, sub-s. 1 (*a*), provides that after the passing of the Act no person shall proceed to execution or otherwise to the enforcement of any judgment or order of any Court (whether entered or made before or after the passing of the Act) for the payment or recovery of a sum of money to which the sub-section applies, except after such application to such Court and such notice as may be provided for by rules under the Act. (1)

Sub-s. 3 provides that where a bankruptcy petition has been presented and the debtor proves to the satisfaction of the Bankruptcy Court that his inability to pay is due to the present war the Court may at any time stay proceedings under the petition.

Clayton, K.C., and *F. Mellor*, for the appellant. The presentation of a bankruptcy petition is a proceeding to execution on or

(1) By the Courts (Emergency Powers) Rules, 1914, dated September 8, 1914, r. 2 provides that for the purposes of s. 1, sub-s. 1 (*a*), of the Act "the Court to which application is made shall be the Court by which the judgment or order for the payment or recovery of a sum of money has been given or made or in which it is being sought."

Rule 3 provides that in cases under s. 1, sub-s. 1 (*a*), "where a judgment or order has been already made, application shall be made by summons to be served at such time and in such manner and to be dealt with according to such practice generally as may be in conformity with the practice of the Court, or division of the Court in question . . . ."

otherwise to the enforcement of a judgment within s. 1, sub-s. 1 (*a*), of the Act. Sub-s. 3 is not exhaustive because, first, it only applies to petitions presented before the passing of the Act; secondly, sub-s. 1 applies only to pre-moratorium contracts, and sub-s. 3 is general; and thirdly, of all ways of enforcing a judgment bankruptcy proceedings being the most drastic, it cannot be supposed that the Legislature intended to prohibit proceedings other than bankruptcy in limine, while it allowed a bankruptcy petition to go to hearing. [They referred to *In re Nance*. (1)]

Duke, K.C., and *E. W. Hansell*, for the respondents, were not called upon.

LORD COZENS-HARDY M.R. In my opinion the decision of the registrar on this point was perfectly right.

In the Courts (Emergency Powers) Act express provision is to be found in s. 1, sub-s. 3, for dealing with a bankruptcy petition. It was faintly argued that that section only applies to a case where a bankruptcy petition has been presented before the Act came into operation. In my opinion that is not the true reading of it. When a petition comes before the bankruptcy registrar or the county court judge as the case may be, whether it is presented before or after the Act, certain powers are given to the Court of Bankruptcy in its absolute discretion, after considering all the circumstances of the case, to stay the proceedings under the petition for such time and subject to such conditions as the Court thinks fit.

In my opinion that is really, in the language of the learned registrar, exhaustive so far as bankruptcy jurisdiction is concerned. To say that you must also have an application to the King's Bench Division in which the judgment was obtained would result in a strange position. There are many acts of bankruptcy which do not involve a judgment at all, and it would be very extraordinary if the hand of the Bankruptcy Court were tied in the case of only one of the acts of bankruptcy, namely, where the petitioner has obtained a judgment which has not been satisfied, and not tied in all the other cases.

(1) [1893] 1 Q. B. 590.

C. A. 1915

SILBER, *In re.*

Lord Cozens-Hardy M.R.

In my opinion there is nothing in the present appeal on this point which can satisfy us that the registrar was wrong. I think no leave was necessary, and the Bankruptcy Court has absolute jurisdiction to do what it thinks right under sub-s. 3. I do not gather that the registrar's discretion under sub-s. 3 is in any way quarrelled with, and that being so, I think the point taken must be overruled.

SWINFEN EADY L.J. I am of the same opinion. In my opinion the proceeding on bankruptcy petition is not within s. 1, sub-s. 1, but it is within sub-s. 3, and the provision made by sub-s. 3 for the Court dealing with bankruptcy petitions is exhaustive, and is the only provision in the Act for dealing with bankruptcy petitions. The appellant has not attempted to make any application under that sub-section on the ground that it is applicable to this case. I am of opinion that there is no other provision in the Act dealing with bankruptcy petitions.

PHILLIMORE L.J. I agree and do not think it is necessary for me to add anything.

Appeal dismissed.

Solicitors: *Paines, Blyth & Huxtable.*

G. A. S.

[COURT OF CRIMINAL APPEAL.]

1915
Feb. 8, 9, 25.

THE KING *v.* KUPFER.

War—Trading with the Enemy—Payment by British Subject residing in Great Britain to Persons in Great Britain with Direction to Credit Neutral with Amount—Debt owed to Neutral by Enemy extinguished by Payment and Credit—Intention of Payer to benefit himself as well as Enemy—Trading with the Enemy Act, 1914 (*4 & 5 Geo. 5, c.* 87), *s.* 1, *sub-ss.* 1 (*b*), 2—*Trading with the Enemy Proclamation, No.* 2, *dated September* 9, 1914, *paragraphs* 5, 7.

By the Trading with the Enemy Act, 1914, s. 1, sub-s. 1, "any person who during the present war trades with the enemy within the meaning of the Act shall be guilty of a misdemeanour."

By sub-s. 2: "For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any Proclamation issued by His Majesty dealing with trading with the enemy. . . . ."

By the Trading with the Enemy Proclamation, No. 2 dated September 9, 1914, paragraph 5: "All persons resident, carrying on business, or being in Our Dominions" are warned not to pay any sum of money "to or for the benefit of an enemy."

Paragraph 7: "Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in Our Dominions, if such payments arise out of transactions entered into before the outbreak of war":—

Held, that the words "for the benefit of an enemy" in paragraph 5 of the Proclamation were introduced for the purpose of preventing devices, tactics, and various means by which mercantile houses might seek, but for those words, to make payments indirectly, notwithstanding that there is an express prohibition of a direct payment. The words are very wide and must be construed to have a very wide application and are intended to cover the making of payments to an enemy by any device or by any recourse to indirect means.

The prisoner was a partner in a firm consisting of himself and two brothers which traded at Frankfurt-on-Main, Germany, and in London. All the partners were naturalized British subjects. The prisoner resided in London and carried on the business of the firm, and his two brothers resided at Frankfurt and carried on the business of the firm there. Before August 4, 1914 (the date on which war broke out between Germany and Great Britain), the firm became indebted to a neutral in Holland in respect of transactions which had taken place between the Frankfurt partners and the neutral. The neutral looked to the Frankfurt partners for payment, and there was no suggestion that he had threatened legal proceedings against the prisoner in respect of

1915

REX
v.
KUPFER.

the debt. Acting upon instructions from his Frankfurt partners, the prisoner, after the date of the Proclamation, paid the amount of the debt to a firm of foreign bankers in London who had a branch in Holland with directions to them to credit the neutral through their Holland branch with the amount paid to them in London, and the foreign bankers did so credit the neutral. He also paid to the London branch of another neutral who carried on business in Rotterdam and London the amount of a debt owing by his Frankfurt partners to the neutral in Rotterdam :—

Held, that, as the effect of payments to the neutrals was to extinguish the obligations of the Frankfurt partners to pay the debts to the neutrals, the resources of individuals in Germany were to that extent augmented and those of Great Britain diminished, and the payments were therefore for the benefit of an enemy within the meaning of paragraph 5 of the Proclamation.

Held, further, that the payments were not protected by paragraph 7 of the Proclamation inasmuch as they were not payments "by or on account of enemies" within the meaning of that paragraph but payments for the benefit of enemies.

Quaere whether the prisoner could have been convicted if he had made the payments under threats of legal proceedings by the neutrals.

In summing up to the jury the judge directed them that if they found that the prisoner made the payments with the intention of benefiting himself it would not quite answer the case and that they must further consider whether he made the payments knowing that they would in fact benefit the enemy and in order to benefit him :—

Held (without deciding that the offence might not be committed even if it was not established that the payments were made in order to benefit the enemy), that the direction was right although possibly a little too favourable to the prisoner.

The offence of trading with the enemy is a serious offence and ought to be dealt with with proper severity, all the circumstances of the case being taken into account.

APPEAL by the prisoner, Albert Kupfer, against his conviction. He also applied for leave to appeal against his sentence.

The prisoner was tried at the Central Criminal Court before Rowlatt J. on January 18, 1915, upon an indictment which (so far as material) charged him with unlawfully trading with the enemy within the meaning of the Trading with the Enemy Act, 1914. (1)

(1) Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 1, sub-s. 1 : "Any person who during the present war trades or has, since the fourth day of August nineteen hundred and fourteen, traded with the enemy within the meaning of this Act shall be guilty of a misdemeanour, and shall—

. . . . . .

"(*b*) On conviction on indictment, be liable to penal servitude for a term not exceeding seven or less than three years or to imprisonment with

The counts contained in the indictment upon which the prisoner was tried were (so far as material) as follows:—

The second count charged him with having, on September 10, 1914, in the City, and within the jurisdiction of the Central Criminal Court, traded with the enemy within the meaning of the Trading with the Enemy Act, 1914, to wit, by paying a sum of 500*l.* to Messrs. B. W. Blydenstein & Co., bankers, for the benefit of certain enemies, to wit, Sydney Kupfer and Richard Kupfer, against the form, &c., and against the peace, &c.

The third count charged him with having committed a like offence on September 15, 1914, by paying through Messrs. B. W. Blydenstein & Co., bankers aforesaid, the sum of 500*l.* for the benefit of the said Sydney Kupfer and Richard Kupfer.

The fourth count charged him with having committed a like offence on September 28, 1914, by paying a sum of 250*l.* to Messrs. B. W. Blydenstein & Co., bankers, for the benefit of the said Sydney Kupfer and Richard Kupfer.

The eighth count charged him with having committed a like offence on September 30, 1914, by paying a sum of 39*l.* 7*s.* 1*d.*

---

or without hard labour for a term not exceeding two years, or to a fine, or to both such penal servitude or imprisonment and fine . . . ."

Sub-s. 2: "For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force . . . . Provided that any transaction or act permitted by or under any such Proclamation shall not be deemed to be trading with the enemy."

By the Trading with the Enemy Proclamation, No. 2, dated September 9, 1914:

Paragraph 5: "From and after the date of this Proclamation the following prohibitions shall have effect . . . . and We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions—

"(1.) Not to pay any sum of money to or for the benefit of an enemy."

Paragraph 6: "Provided always that where an enemy has a branch locally situated in British . . . . territory . . . . transactions by or with such branch shall not be treated as transactions by or with an enemy."

Paragraph 7: "Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in Our Dominions, if such payments arise out of transactions entered into before the outbreak of war . . . ."

1915

REX v. KUPFER.

to Messrs. Charles Cornelder & Sons for the benefit of the said Sydney Kupfer and Richard Kupfer.

The indictment contained similar counts in respect of other sums of money, upon which no conviction took place, and certain counts for conspiracy, which, however, were not proceeded with.

The following statement of the facts is in substance taken from the judgment of the Lord Chief Justice. The prisoner, Albert Kupfer, was a member of the firm of Bettmann & Kupfer, which traded in Frankfurt-on-Main, Germany, and also in London and elsewhere. The firm consisted of three partners, Sydney and Richard Kupfer, who resided in Frankfurt, and carried on business there, and the prisoner, who resided in London and carried on the business of the firm at Barbican, in the City of London. The three partners were all naturalized British subjects. According to the evidence the business consisted substantially of the purchase of manufactured and other goods, including enamel ware, and the shipment of those goods to British Colonies, South America, Cuba, and elsewhere. In the main the activities of the prisoner were centred in collecting moneys due for the goods which had been sold and remitting those moneys to the house in Frankfurt. Throughout the trial reference was made to the Frankfurt house and to the London house, but those were merely convenient terms to use to indicate the business carried on by the two partners in Frankfurt and the prisoner, the partner, in London, and no distinction was drawn by Rowlatt J. between the firm (that is the partnership) in Frankfurt and in London.

On August 4, 1914, before war was declared between Germany and this country, a letter was written by the Frankfurt partners to the prisoner in anticipation of difficulties in carrying on business from Germany and particularly in receiving remittances from this country, and from the perusal of that and other letters it was clear that the prisoner had until the war commenced no business relations with a certain Dutch firm of enamel iron manufacturers carrying on business near Terborg, in Holland, the Dutch firm throughout the case being called "Terborg" for convenience. Terborg had before the outbreak of war supplied

goods on the instructions of the Frankfurt partners. The prisoner apparently knew so little of Terborg that in the letter of August 4 the address was given by the Frankfurt partners, with instructions to the prisoner to get into direct communication with Terborg and to ship orders, if any, through Messrs. Muller & Co., of Rotterdam, and to provide for insurances, &c., "in case our intercourse with you is entirely broken off." The anticipations of the Frankfurt partners were fully justified, because war was declared at 11 o'clock at night on August 4, 1914, and intercourse then between Germany and England was prohibited. The partnership was by operation of law dissolved by the declaration of war. (1)

The correspondence established beyond all doubt that the Frankfurt partners were issuing instructions to the prisoner, giving him directions as to how to carry on the business and complete the transactions which had been begun and were being effected by the Frankfurt partners before the war began. On August 13 the prisoner wrote a letter to Terborg—the first communication between him and Terborg—in which he stated that "Our Frankfurt house has asked us to enter into direct communication with you in reference to further orders for enamel ware which we might wish to place with you," and "Any goods which we might order from you have to be forwarded to Messrs. W. H. Muller & Co., Limited, Rotterdam." On August 17 the first communication by Terborg to the prisoner took place in answer to the letter of August 13, wherein Terborg said: "We are quite willing to enter into direct communication with you . . . . on the basis of the contract with your Frankfurt house," and "You could also pay the amount due by your Frankfurt house." They then stated that otherwise it would make it difficult for them to ship the goods which they had still in hand for the Frankfurt house; and then followed an intimation that payment might be made through Messrs. Blydenstein & Co., foreign bankers, of Threadneedle Street, E.C.

One other letter of great importance was dated August 26 and was sent by the Frankfurt partners to Terborg. Although not written by the prisoner it was enclosed in a letter written by

(1) See Lindley on Partnership, 8th ed., pp. 111, 648.

1915

REX v. KUPFER.

Terborg to him obviously, because it was intended that it should be enclosed; and there was nothing to indicate any dissent from it by the prisoner; indeed the subsequent correspondence showed that he was acting on it. The letter of August 26 showed that there had been at the beginning of the war three cheques drawn by the prisoner on the London City and Midland Bank, the bankers in London of the firm Bettmann & Kupfer, payable to the Frankfurt partners, and those cheques were stopped by the prisoner; that is to say, notice was given that payment of them should not be made by the London City and Midland Bank, quite early in the war. Two of those cheques were for 100*l.* and 400*l.* respectively, making a sum of 500*l.* At the commencement of the war there was a sum of 14,916 marks, roughly 750*l.*, due by the Frankfurt partners to Terborg, for orders which had been given from Frankfurt to Terborg. A payment was made by the prisoner on September 10, 1914, of 500*l.* to Messrs. Blydenstein & Co., foreign bankers, of Threadneedle Street, with the object of that sum being paid to Terborg by Blydenstein & Co.'s house in Holland, to whom the money was to be remitted by their London house, and instructions to that effect were given by the prisoner to Blydenstein & Co. in London. The second and third counts of the indictment were based upon the payment of the 500*l.* It was quite clear from the letter of August 26, from Frankfurt to Terborg which was forwarded to the prisoner, that the intention was that by the payment of the 500*l.* to Blydenstein & Co. for Terborg, the two cheques of 100*l.* and 400*l.* mentioned above were to be treated as cancelled; in other words, that the money which would in the ordinary course have been paid direct from London to Frankfurt was paid by the indirect means of liquidating the obligations of Frankfurt to Terborg.

Throughout the whole of these transactions instructions were being received by the prisoner from his two partners in Frankfurt. Messrs. Blydenstein & Co. became somewhat alarmed, or at any rate suspicious, as to whether they ought to make the payment of the 500*l.*, probably because of the German name of the firm Bettmann & Kupfer, giving them instructions or sending the money to them, and they then made inquiries. The result of those inquiries was that the prisoner assured them that

his firm was a British firm. He also produced to Mr. Doeschatte, their representative, invoices containing the word "London" written after the name "Bettmann & Kupfer" after an erasure had in fact been made of words which might be "Frankfurt-on-Main" or "Frankfurt." The result was that Mr. Doeschatte thought that the firm of Bettmann & Kupfer was British, and that the goods were to be dealt with in the ordinary way by a firm in this country. Under the powers conferred by the Trading with the Enemy Act, 1914, a Board of Trade inspector examined the documents of the firm.

On September 15, 1914, Blydenstein & Co. credited the branch in Holland with the 500*l.*, who credited it to Terborg.

On September 28, 1914, the defendant paid to Messrs. Blydenstein & Co. a further sum of 250*l.* which the Hamburg partners owed to Terborg, with a request that it should be credited to Terborg, and on October 28 Terborg was credited with that amount.

On September 30, 1914, the defendant, in accordance with a request contained in a letter received by him from one Van Collem, the representative in Amsterdam of the Frankfurt house, paid to Messrs. Charles Cornelder & Sons of Cullum Street, London, 39*l.* 7*s.* 1*d.* Cornelder & Sons were shipping agents carrying on business at London, Rotterdam, and other places. Bettmann & Kupfer of Hamburg had on July 27, 1914, given shipping instructions to the Rotterdam branch of Cornelder & Sons in respect of certain goods which were to be shipped by that branch on their account to South America, and the 39*l.* 7*s.* 1*d.* became due in Rotterdam on that date from the Frankfurt partners to Cornelder & Sons for their charges and the shipping expenses in respect of those goods.

In the course of summing up to the jury Rowlatt J. said: "The question is whether these payments have been made for the benefit of the Frankfurt people so that the resources of the community of Frankfurt are augmented. . . . . It may be that a man would pay because he could not help himself; because he was liable to pay in London, and could not help himself. This man was probably liable to pay as a partner, and probably, according to our law, they could come into our Courts here and

1915

REX v. KUPFER.

sue him for the debt. If a man pays because he cannot really help it, I cannot think that the Proclamation intended that there should be a crime. You have the benefit in this country of not committing a crime unless you like; to make a man commit a crime by doing something which he cannot help is out of the question. If he paid because he was obliged to pay, that would not be a crime within the section. You may find, of course, that a man pays money which only incidentally benefits the enemy. . . . . It is said on behalf of the prisoner with a good deal of plausibility that he wanted to benefit himself and incidentally, if you like, his brothers, but he wanted 'to collar the business,' and so he was prepared for that purpose, and with that motive, to pay the debts which had been incurred by the Frankfurt firm. I have no doubt that was his motive, but I do not think that quite answers it. . . . . I do not think it will do to say that he was moved by the consideration of his own advantage to make this payment, and to consider that as if it was exactly opposite or in contradiction to a payment for the benefit of the enemy—as if paying for Frankfurt was one thing, and paying for the benefit of himself in London was another thing. . . . . The question we have really to decide is whether he made these payments, not because he was obliged to do so, but because he thought he would pay these debts for reasons which would suit him; because, although he need not have done so, he wanted Frankfurt's debt paid either for reasons of his own or theirs. If he paid the debts with the intention of paying Frankfurt's debt for those reasons and not because he was compelled to, then I think . . . . he has committed a breach of this Proclamation. . . . . I think that a payment made to a person 'resident, carrying on business, or being in Our Dominions,' in paragraph 7 of the Proclamation, means payment in British Dominions in liquidation of transactions which called for payment in British Dominions. . . . . You have to look at the transactions and see whether there was simply a payment made by this man perfectly voluntarily, in order to liquidate the debt owed by Frankfurt to the people to whom they owed it. . . . . Were the payments willingly and knowingly paid by this man for the benefit of the Frankfurt firm, and to liquidate the

Frankfurt firm's obligations? . . . . The main question you have got to consider is whether it is made out that this man—partly, if you choose, because he thought it would benefit himself, among others, and partly to keep the business alive—did, without any reason except for his own and his partners' convenience, pay the money which his partners, being enemies, were bound to pay, and so make a payment for their benefit. If you think the inference is that he did make that payment knowing perfectly well what he was doing and intended to do it with that object and purpose it seems to me you ought to find that he has committed a breach of this Proclamation."

The jury convicted the prisoner upon each of the four counts and he was sentenced to one month's imprisonment in the second division.

The prisoner appealed against his conviction upon the grounds (inter alia)—

(1.) That the facts adduced in evidence against him did not disclose any offence in law.

(2.) That the judge misdirected the jury as to the substance of the offences.

(*a*) In directing the jury that although the accused was liable by law to make the payments, and would have been adjudged by the Court to make these payments, the question whether or not he committed the offence depended upon whether his motive in making the payments was mixed with the desire that his partners should be released from the debt.

(3.) In directing the jury that even if the prisoner's motive for the payments was to further the business conducted by him in London, they might still find him guilty.

(4.) In misdirecting the jury as to the construction of s. 7 of the Proclamation of September 9, 1914.

The ground of his application for leave to appeal against his sentence was that "having regard to the very extraordinary facts of the case" it was excessive.

Sir E. Carson, K.C., Colam, K.C., and *Huntly Jenkins*, for the prisoner. The question is whether the prisoner, who as the partner in London could be sued in England by Terborg, the

1915

REX v. KUPFER.

neutral in Holland, for the debt due from the firm of Bettmann & Kupfer to the neutral, can be convicted of trading with the enemy in consequence of having paid that debt to the neutral. There was only one partnership, and it was carrying on business in Frankfurt and London. The three partners cannot be dissociated merely because one partner lives here and the other two in Frankfurt. There is nothing to prevent a person doing acts with a view to carrying on his business in England. Until the Proclamation of September 9, 1914, there was nothing to prevent the prisoner paying the debt. The payment is not within that Proclamation, which declares by paragraph 5 that a payment is not to be made by persons carrying on business in this country "to or for the benefit of an enemy."

The prisoner paid the debt not "for the benefit of an enemy" but for the benefit of the partnership of which he was a member, and the fact that incidentally the enemy benefited does not bring the payment within the words of the Proclamation. If the prisoner had made the payment to his partners in Frankfurt he would have committed an offence, but no offence is committed where, as in the present case, the payment was made to a neutral for the prisoner's own benefit. Immediately war broke out between England and Germany the partnership was dissolved as a matter of law, but the debt which was incurred before war broke out remained the debt of the partnership, and the prisoner could be sued in England for it. The payments are amongst those which are allowed by paragraph 7 of the Proclamation of September 9 as being payments "by or on account of enemies to persons . . . . carrying on business or being in Our Dominions."

A firm carrying on business at Rotterdam as Cornelder & Sons were, and also in London are, within the words "or being in Our Dominions." Paragraph 7 does not apply merely to debts which are payable in England. The payments to Blydenstein & Co. were clearly within the paragraph, as they were persons in London. The prisoner was liable to pay equally with his partners in Frankfurt. If he were sued here by the neutral for the debt he would have no defence to the action, and it could not be held that he would commit an offence by making

the payment under the judgment of the Court. If a partner in England pays a debt owing by his firm, the debt having been incurred before the outbreak of war, to a neutral he does not commit the offence of trading with the enemy. He does not make a payment for the benefit of the enemy within the meaning of the Proclamation of September 9, 1914. It is immaterial whether the payments were made to or for the benefit of the enemy, because they were made to "persons . . . . carrying on business or being within Our Dominions."

The judge at the trial was wrong in directing the jury that the motive of the prisoner was material. The prisoner's motive was irrelevant, but even if it was material inasmuch as it was in order to benefit himself that he made the payments his acts are within the protection conferred by paragraph 6 of the Proclamation as being a transaction with a branch of an enemy locally situated in British territory.

The judge was wrong in directing the jury that the prisoner would be guilty of the offence even though his motive was to benefit himself. That motive was praiseworthy. There was nothing wrong in the prisoner trying to establish his business in this country so long as no cash was actually sent to Germany. To release the firm of Bettmann & Kupfer from a debt is a very different thing from making a payment of money to the Frankfurt partners. The correspondence which took place between the prisoner and his Frankfurt partners was not for their benefit, but was to obtain information for the benefit of himself. So long as he did not trade with individuals in Germany or take trade to Germany or send any money there he was not doing anything contrary to the Proclamation. No money went to Germany. Nothing the prisoner did led to any payment to the Frankfurt firm. The only result of his action was that the debt due to the neutral was discharged. There is nothing in the Proclamation which prevents the prisoner carrying on his business here. If a person is legally compellable to pay a debt he does not come within the Trading with the Enemy Act, 1914, or the Proclamation. The payment made by the prisoner was not a voluntary one; it was a payment made in discharge of a debt owed by his Frankfurt partners and which

1915

REX v. KUPFER.

he was legally liable to pay. [The Trading with the Enemy Proclamation, dated August 5, 1914, and Order XLVIII., r. 3, of the Rules of the Supreme Court, 1883, were also referred to.]

R. D. Muir and *E. C. P. Boyd*, for the prosecution. If the prisoner had been sued by Terborg it does not follow that he would have been compelled to pay the debt. The Court before which the action came would inquire if the payment would enure to the benefit of the enemy, and if so it would not order payment: *Schmidt* v. *Van der Veen*. (1) It is therefore an unfounded assumption that an action brought against the prisoner would result in his making the payment: *Evans* v. *Richardson*. (2) If the Court trying the action had the facts of the present case before it, it would not order the payment to be made, inasmuch as it would be for the benefit of the enemy. That it was for the benefit of the enemy is clear from the correspondence. The result of what the prisoner did was to take over the liabilities of the German partners, and the result was that Germany benefited by being released from an obligation to pay 789*l.* 7*s.* 1*d.*

The fact that the payments were made to persons in England does not bring them within the protection given by paragraph 7 of the Proclamation of September 9, 1914. The Court must look at the substance and not at the form of the transaction. Although in form it was a payment to persons in England it was in substance a payment to the enemy. The money went out of England by means of Blydenstein & Co. crediting the branch in Holland, who would pay Terborg. A person resident in England is prohibited from trading with the enemy, but if he is resident in a neutral country he can continue to trade with the enemy. Clause 7 of the Proclamation of September 9, 1914, only applies to a payment made by a person resident in England to a person also resident in England in a case where the person making the payment has had a transaction with the person to whom he makes it. The destination of the money must be looked at, not merely the hand which receives it. Whatever the prisoner's motive may have been, if he made a payment which was in fact for the benefit of the enemy he committed the offence of trading with the

(1) (1915) 31 Times L. R. 214. (2) (1817) 3 Mer. 469.

enemy. If he had paid because he thought he was compellable to pay, he could not probably have been convicted of a crime. But the judge directed the jury perfectly correctly that if the payment was made for the brothers' benefit and incidentally for his own benefit, they ought to convict him. There was no misdirection in the summing-up. The introduction of the consideration of motive was in the prisoner's favour. It is sufficient to constitute the crime if the jury could draw the inference that the prisoner knew that his act would benefit the enemy although he intended to benefit himself.

Sir E. Carson, K.C., in reply. *Schmidt* v. *Van der Veen* (1), where payment to the plaintiff would have created an obligation upon him to pay an alien enemy, has no application to the present case, where the prisoner, if judgment were obtained against him by Terborg, would not as the result be under any obligation to pay an enemy. There is no authority to the effect that a neutral cannot recover a debt from a British subject although incidentally an enemy may obtain the money. If the substance of the transaction must be looked at, the question ought to have been left to the jury whether the payments were in fact made to the persons in England or to or for the benefit of the enemy.

In order to constitute a crime there must be something in the nature of mens rea. It was necessary in order to convict the prisoner that facts should be proved from which the jury could draw the inference that he intended to benefit the enemy. But that was not the case which the judge left to them. He said it would be sufficient if he tried to benefit himself by "collaring the business." The jury therefore may have convicted him on the ground that he was trying to benefit himself.

Cur. adv. vult.

February 25. The judgment of the Court (Lord Reading C.J., Ridley and Atkin JJ.) was delivered by

LORD READING C.J. The prisoner was convicted upon four counts of an indictment which charged him with unlawfully

(1) 31 Times L. R. 214.

1915

REX v. KUPFER.

trading with the enemy by making certain payments of 500*l.*, 250*l.*, and 39*l.* 7*s.* 1*d.* for the benefit of certain enemies, namely, his two brothers, who carried on business in Frankfurt. There were other counts of a similar character in respect of other payments, but upon those counts there was an acquittal, and a count for conspiracy also contained in the indictment was not proceeded with. He now appeals to this Court, the substantial ground of his appeal being that the payments of 500*l.*, 250*l.*, and 39*l.* 7*s.* 1*d.* respectively in respect of which he was convicted were not payments for the benefit of enemies.

The case undoubtedly raises difficult questions of law, although there does not seem any doubt as to the true state of facts. It is therefore necessary to review the material facts with some particularity in order to appreciate the position. [Having stated the facts above set out his Lordship continued:] Since the decision of the Court of Appeal in *Porter* v. *Freudenberg* (1) there is no doubt that a British subject carrying on business or resident in the enemy country is to be treated, when considering the commercial intercourse between him and this country, as an alien enemy, though it is true to say that he may not be in fact an enemy. If he is residing in the enemy country he is treated as an alien enemy.

In the present case both the partners in Frankfurt and also the prisoner were naturalized subjects of the Crown; but in the circumstances the two partners resident in Frankfurt must be treated as alien enemies; the prisoner, who is resident here, being, of course, entitled and subject to the full rights, liberties, and obligations of a British subject.

The effect of the payment on September 10, 1914, of the 500*l.* to Blydenstein & Co. in London with instructions to remit it to Terborg through their branch in Holland would be that 500*l.* out of the 750*l.* due by the Frankfurt partners to Terborg was paid by the prisoner handing over 500*l.* to Blydenstein & Co. to be transmitted through them to Terborg, in liquidation of the amount due by the partnership for orders which had been given by the Frankfurt house, which was conducted actively by the two enemy partners of the firm.

(1) [1915] 1 K. B. 857.

It follows that to the extent of 500*l.* the German house had liquidated its obligations to Terborg in Holland. From that it follows that the prisoner had paid to Terborg a debt for which Terborg was looking to the Frankfurt partners. The payment of the 500*l.* was in discharge of the obligations on contracts made between Holland and Germany, and therefore to that extent the resources of individuals in the Empire of Germany were either augmented or protected. The resources of individuals in this country were diminished to the extent of that 500*l.*; so that by this indirect means 500*l.* was paid by London to Terborg on account of the German debt to Terborg. That is the substance of the transaction to which attention must be directed. Similar observations apply to the payment of 250*l.* which was also due from the Frankfurt partners to Terborg, and to the payment of 39*l.* 7*s.* 1*d.* due from them to Messrs. Cornelder & Sons in Rotterdam. With regard to the statement made by the prisoner to Messrs. Blydenstein & Co. that his firm was a British firm, it appears to us he was justified in making that observation to the extent that the partners were subjects of the British Crown, but it cannot be said that it was a candid statement.

Moreover, invoices were produced which the slightest examination shows contain the word "London" written in after the name "Bettmann & Kupfer," and after an erasure had been made of words that may be "Frankfurt-on-Main" or "Frankfurt," and there does not appear to be any dispute that that was done. The defence contend that that was a very natural thing to do as the goods were to be treated as being invoiced to the firm of Bettmann & Kupfer in London. No one can say those are frank statements, but at the same time no one would desire to press too hardly against the prisoner in the circumstances any statement that he may have made. There was, however, certainly ground for the jury thinking that his object was to conceal from Messrs. Blydenstein & Co. the fact that it was a firm with two enemy partners in Frankfurt and that these goods had been shipped on the order of the Frankfurt partners. Mr. Doeschatte, Messrs. Blydenstein & Co.'s representative, said in the box that he thought it was a British firm

1915

REX v. KUPFER.

and that the goods were to be dealt with in the ordinary way by a firm in this country.

Now, those are substantially all the facts to which it is necessary to call attention. I might add that under the Trading with the Enemy Act, 1914, and the power given thereby to send an inspector at the instance of the Board of Trade into the office of the firm and inspect the books, an inspector was sent and there was an examination of the documents of the firm and in consequence information obtained on which no doubt the prosecution was launched. The Act was passed with the object of obtaining information which could not be obtained otherwise and which could be used as evidence against the person from whom the information had been obtained.

In these circumstances Rowlatt J. left certain questions to the jury, pointing out to them the defences that had been raised, and it cannot be said that he put the case in an unfavourable light to the defendant. But it is sufficient to say that he called attention to the various points and put them to the jury.

Three points were raised by Sir Edward Carson on the prisoner's behalf. The first, on which I think most insistence was placed, and rightly, because it is a difficult point, was that the prisoner, being a partner resident in this country and paying the debt of a firm of which he was a member in respect of transactions effected before the war to a neutral (and therefore it was contended not to an enemy), the payment cannot in any circumstances be treated as one for the benefit of the enemy. The indictment in this case was based upon paragraph 5, sub-paragraph 1, of the Proclamation issued on September 9, 1914, which prohibits the payment of any sum of money to or for the benefit of an enemy. That Proclamation was validated by the Trading with the Enemy Act, 1914, passed on September 18, 1914, and it has, therefore, the full force and effect of a statute by virtue of that enactment.

The first question is what is the meaning of the words "for the benefit of an enemy"? In our judgment those words were deliberately introduced for the purpose of preventing devices, tactics, and various means by which mercantile houses might

seek, but for those words, to make payments indirectly, notwithstanding that there is an express prohibition of a direct payment. It was doubtless considered, that in making this Proclamation it was necessary to cover that ground and to throw the net wide in order that there should not be this means of evading the law and therefore of assisting the enemy by adding to or protecting his resources.

Those words are very wide and must be construed to have a very wide application. It is not necessary or desirable to define exactly the meaning of the words. They are intended to cover the making of payments to the enemy by any device or by any recourse to indirect means.

That being the state of the law it was contended on behalf of the prisoner, notwithstanding the facts to which attention has already been directed, and although there can be no doubt that the payment by the prisoner to Terborg did in fact benefit the enemy partners, that inasmuch as he, the prisoner, was liable as one of the partners of the firm to make that payment, he cannot in law be held to have committed a crime because he had only done that which he could be legally compelled to do.

That is the contention which presented the most difficulty to this Court. We have come to the conclusion that in truth it does not represent the real state of facts; there is not from beginning to end of the correspondence produced in Court any indication of any demand by Terborg for the money; of any threat by Terborg of issuing process against the prisoner if he did not pay the money; indeed from the letters to which we have called attention it is perfectly plain that Terborg had no direct relations with the prisoner in London and that his relations were merely with the partners in Frankfurt. Now no doubt it is true that if the prisoner had been compelled by means of an action to pay this money to Terborg it could not be said that he would then have committed a crime. It may be true—we do not decide it—that upon a threat against him of process he might be justified in paying the money. There are obviously so many circumstances to be considered in that connection that we do not for one moment intend to decide that point.

1915

REX v. KUPFER.

It does not arise here. There might easily be collusion which would lead to the issuing of a writ and a payment under pretence of a threat which a jury might think under the circumstances of the case did not justify the payment.

We assume that the partnership came to an end by operation of law as soon as war was declared. There can be no partnership between enemies of this country and a subject of this country when war has once been declared. Commercial intercourse is prohibited, and immediately that prohibition comes into force it is impossible for the relationship of partners to subsist, at any rate during the war. The partnership was therefore at an end. That is used by the defence for the purpose of saying that the appellant was liable for the full amount of the debt as one who had been a partner and that he would have been bound to pay it. I have already pointed out that there is no trace of any such view in the whole of the correspondence. It was also urged that the prisoner must be presumed to have known the law. That would be a strong presumption to make though it may have to be legally made in this case. When war broke out very few persons indeed—certainly without recourse to the books—would know that the partnership came to an end immediately war commenced. But giving full effect to the law—and we assume not only that the partnership came to an end, but that the prisoner knew that it did so because he was presumed to know the law—what is the position? It is this—and it is a very striking fact in this case: from the moment the war commenced till a late date in the correspondence, commercial intercourse was continued between the two alien enemies in Frankfurt and the British subject in this country. He continued to receive instructions from and to communicate with them and they with him; their commercial correspondence never really ceased; the only difference being that the direct means was stopped and indirect means had to be resorted to, and it was found that by means of Holland the communication which hitherto existed could be made between London and Frankfurt. That being so and treating as we do the partnership as at an end, if the prisoner in pursuance of instructions from the enemy carried on contracts with and made the payment to Terborg, it seems

to us that it is impossible to hold that he has the defence in law upon which so much stress was laid.

It is not necessary to say more about that part of the case. Viewed from the strictly legal aspect, which is in truth a technical one and not in accordance with the real facts, the defence is in the difficulty that having taken advantage of it they are confronted by correspondence and instructions between persons who are not partners and between whom the relationship of agent and principal no longer subsists and who are a British subject and alien enemies. If payments were made—as they were in this case—for the benefit of the two persons who had given the orders for the payments to be made it is plain they were made upon instructions of enemies to a British subject, and there cannot be a defence in law based upon the relationship of partners which had existed but had come to an end by the mere declaration of war.

It was further contended on behalf of the prisoner that under paragraph 7 of the Proclamation of September 9 the payments were "by or on account of enemies to persons resident or carrying on business or being in Our Dominions" and in respect of transactions which had taken place before the war. It is sufficient to say for the purposes of this case that the facts as proved do not in our judgment bring the payments within that paragraph. They were not payments in the sense of paragraph 7. The money was merely handed over to Messrs. Blydenstein & Co. and Messrs. Cornelder & Sons in London for the purpose of being sent abroad in order that it might be paid to persons in Holland in respect of the obligations of two out of three members of the firm.

They were not payments "by or on account of enemies," which are the words of the Proclamation. They were payments to or for the benefit of enemies, and no such payment is within the words used in paragraph 7. In this case, as we have indicated, certain questions which might arise do not arise upon the particular facts of the case, and paragraph 7 in our view affords no defence.

There remains the third point, namely, that the judge in directing the jury said that even if the intention of the prisoner was

1915

REX v. KUPFER.

" to collar the business for London," which was the phrase used, that nevertheless it would not be sufficient and that would not quite answer the case. The contention on behalf of the prisoner was that his intention was to get the business transferred to London so that he might carry it on, and that if that was so—if he made the payments with that intention and for that purpose—they were not for the benefit of the enemy. What the prisoner's intention was is of course a question of fact. The effect of the learned judge's summing-up, taking it as a whole, as we ought to, and as has been repeatedly laid down in this Court, without too microscopic an examination of particular words used, was that it did not quite answer the case against him for the prisoner to say that he made the payments " to collar the business." That direction was right. It was a point—perhaps a strong one—for the consideration of the jury, but the learned judge's view was that it did not quite answer the charge against the prisoner. He told the jury so and that they still would have to consider the whole of the facts, and added in substance that what they had to determine was whether the prisoner made the payments knowing that they would in fact benefit the enemy, and in order to benefit him. Without deciding that the offence might not be committed even if it was not established that the payments were made in order to benefit the enemy, it is sufficient to say that that is a direction to the jury which is not unfavourable to the prisoner, and which in our opinion, having regard to the law, cannot be said to put the case in any way harshly against him, but possibly a little too favourably.

We have come to the conclusion that there was no misdirection by the learned judge, and that there is no fault to be found with his summing-up.

It was also contended that the sentence of one month's imprisonment in the second division was too severe. We desire to make it quite plain in this Court that the offence of trading with the enemy is a serious offence and should be dealt with seriously by those whose duty it is to try these cases. The object of the punishment is to prevent trading with the enemy; to deter persons who might be tempted for the sake of gain to engage in operations detrimental to the interests of this realm

and which would have the effect of assisting the enemy and enabling him by adding to or protecting his resources to prolong the war. Nothing that we have said should give the slightest colour to the view that offences of this character should be met by a slight punishment only. In this particular case the learned judge, who had all the circumstances before him, came to the conclusion that he could deal justly with it by inflicting a punishment of one month's imprisonment in the second division. We are of opinion that it cannot be said that that sentence was too severe, and certainly this Court will not interfere with it.

We have thought right to make these observations with reference to the gravity of this offence lest it might be thought that in future cases of trading with the enemy when proved would be dealt with lightly either by this Court or the Court trying the offender. There are circumstances in the present case which in our opinion quite justified the learned judge in coming to the conclusion that a mild sentence was sufficient, but it is well that it should be known that the offence must be looked upon by Courts of justice, which are established to carry out the law of this country—and at this period more particularly the law which exists for the purpose of protecting this realm during the war—as one which should be dealt with with proper severity, at the same time taking into account all the circumstances of the particular case. This appeal must therefore be dismissed.

As the learned judge gave a certificate that it was a fit case for appeal the days during which the prisoner has been in custody will count as part of his sentence.

Solicitor for prosecution: *Director of Public Prosecutions.*
Solicitors for prisoner: *Oppenheimer & Nathan.*

J. E. A.

1915

March 15.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* ROBINSON.

Criminal Law—Attempt to obtain Money by False Pretences—What Acts necessary to constitute an Attempt.

A person cannot be convicted of an attempt to obtain money by false pretences, unless he made the false pretence to the person from whom the money was intended to be obtained, or to his agent; a false pretence made to a third person, although intended to be ultimately reported to the person from whom the money was to be obtained, will not suffice.

A jeweller, who had insured his stock in trade against burglary, with the object of obtaining the policy money from the insurers falsely represented to the police that a burglary had been committed on his premises and the jewellery stolen, in the hope that the police would make a report by which the insurers might be induced to pay; but before he had made any communication about the pretended burglary to the insurers the fraud was discovered and he was arrested:—

Held, that on those facts he could not be convicted of an attempt to obtain money from the insurers by false pretences.

Appeal to the Court of Criminal Appeal.

The appellant, who was a jeweller at Oldham, was convicted at the Manchester Assizes of having attempted to obtain money from certain underwriters at Lloyd's by false pretences.

On November 5, 1914, he insured his stock of jewellery at Lloyd's against burglary for twelve months for 1200*l*. By the terms of the policy it was provided that "The assured, in case of loss or damage, shall, as a condition precedent to his right to be indemnified in respect thereof, give to the underwriters such information and evidence as to the property lost or damaged, and the circumstances of the loss or damage, as the underwriters may reasonably require and as may be in the assured's power."

On the morning of December 11 a policeman who was passing the appellant's shop heard some one inside shout out "I am bound and gagged. Open the door." The policeman whistled for assistance, some other policemen came up, and they burst open the door. Inside they found the appellant with his legs and one hand tied with cords. He told them that on the previous night after locking the door of the shop he put his

jewellery in his safe and was going upstairs when he was knocked on the head and stunned. On his regaining consciousness he found himself in the condition in which they saw him. He looked into the safe and said "They have cleared me out." The safe was open and empty. The police, who were not inclined to accept his statement, took him to the police station to give a more detailed account. They then went back to the shop and searched the premises, where they found the jewellery concealed in a recess at the back of the safe. They returned to the station and asked the appellant how he accounted for the jewellery being where they had found it. He replied "I am very sorry, but the times have been bad through the war. I am a long way behind last year's takings. Being inspired by the insurance I got from the last robbery at my shop I did it to get more money from them." He was then arrested and charged. At the trial Lawrence J. directed the jury that if they thought the prisoner intended to obtain the 1200*l.* from the underwriters by falsely pretending that he had been the victim of a burglary, and that if he had not been arrested he would have gone on to make a claim against the underwriters, they might find him guilty of an attempt to obtain the money by false pretences. The jury convicted the prisoner, who appealed.

Gordon Hewart, K.C., and *McCleary*, for the appellant. The evidence does not disclose an attempt to obtain the money. Before a person can be convicted of an attempt to obtain money by false pretences it must be shown that he has done everything that is necessary on his part to enable him to receive it. This principle is well illustrated by the case of *Reg.* v. *Eagleton*. (1) There a baker had contracted with the guardians of a parish to supply loaves of a certain weight to the outdoor poor. Upon delivery of the loaves he was to be credited in account by the relieving officer, and was to be paid by the guardians some months later. The baker having supplied to the paupers loaves which to his knowledge were deficient in weight, but for which he was credited in account with the full weight, was

(1) (1855) Dears. 515.

1915

REX v. ROBINSON.

charged with attempting to obtain money from the guardians by false pretences and convicted. On appeal it was contended on his behalf that the obtaining of the credit in account, although a necessary step towards obtaining the money, could not be said to be an attempt to obtain it. The case was argued before a Court of nine judges who sustained the conviction. Parke B. in delivering the judgment of the Court said: "The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are; and if in this case, after the credit with the relieving officer for the fraudulent overcharge, any further step on the part of the defendant had been necessary to obtain payment, as the making out a further account or producing the vouchers to the board, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining the money. But on the statement in this case no other act on the part of the defendant would have been required. It was the last act *depending on himself* towards the payment of the money, and therefore it ought to be considered as an attempt." In the present case many things remained to be done by the appellant before he could get the money. Even if he had made a claim against the underwriters that would not have been enough unless he had coupled it with the "information and evidence as to the property lost" required by the terms of the policy. But he did not make a claim of any kind against the underwriters, or even communicate to them or to any agent of theirs the facts of the supposed burglary upon which the claim was intended to be based. The police were not the agents of the underwriters to receive such a communication. The same principle was laid down in *Reg.* v. *Button*. (1) There the prisoner, who was a good runner, entered for two handicap races at an athletic meeting in the name of another person who was a less good runner, whereby he got a long start to which he was not entitled,

(1) [1900] 2 Q. B. 597.

and won both races. His false entry was discovered before he had an opportunity of applying for the prizes. It was held that he had committed an attempt to obtain the prizes. But there he had done all that was necessary to entitle him to receive them; no formal claim was necessary. Wright J. said: "If nothing more had been shown than that the defendant had entered for the races in a false name, the case would have been different. If he did not run or claim the prize it would be difficult to say that there was an actual attempt to obtain it. But here in effect he did claim the prize." Here the appellant's act amounted to preparation of evidence in his favour intended to support a claim thereafter to be made, but it amounted to nothing more. It was too remote to constitute an attempt to obtain the money.

Bodkin and *Jordan*, for the prosecution. The appellant's act was sufficiently proximate to the full offence to amount to an attempt to commit it. The definition of an attempt given in Stephen's Digest of the Criminal Law, art. 50, is as follows: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted." That definition exactly covers the present case. The jury must be taken to have found as a fact that the appellant would have gone on to make a claim against the underwriters if the commission of the offence had not been interrupted by his arrest. The rule laid down by Parke B. in *Reg.* v. *Eagleton* (1), that a man cannot be said to have attempted to obtain money so long as any act remained to be done by him to enable him to obtain it, has not been followed in subsequent cases. Indeed it was departed from in a case decided in the very next term, and to the decision in which the same judge, Parke B., was a party: *Reg.* v. *Roberts*. (2) There the prisoner was indicted for causing to be made certain dies of the obverse and reverse sides of a silver half-dollar of Peru with intent to use them and by means thereof to make counterfeit Peruvian half-dollars, "and so attempting to make such counterfeit coin." For the making of such counterfeit coin the coiner would require, in addition to the dies, a press,

(1) Dears. 515. (2) (1855) Dears. 539.

1915

REX v. ROBINSON.

copper blanks, a galvanic battery, and a preparation of silver. The prisoner had procured the dies and the galvanic battery, but had not got the other requisites. Under the Coining Act then in force, 37 Geo. 3, c. 126, it was not a substantive offence to have possession of coining instruments, and upon proof of such possession the defendant could only be convicted of attempting to coin or not at all. On the above facts the prisoner was convicted of the offence charged, that is attempting to make counterfeit coin, and the Court of Criminal Appeal affirmed the conviction upon the ground that he was in possession of instruments which could be used for no other purpose except that of committing the full offence of coining. So here the scene acted by the appellant could not have been acted with any possible object except that of obtaining the insurance money from the underwriters. Again in *Rex* v. *Laitwood* (1) the defendant represented to one Slater that his (the defendant's) firm were about to transfer their business to a company, and suggested to him that he should apply for the appointment of representative of the company in a particular district, telling him at the same time that the person who obtained the appointment would have to invest 100*l.* in debentures or shares of the company. With the object of inducing Slater to believe that the business to be transferred to the company was a substantial one, and that the suggested appointment was likely to prove valuable, he produced a balance-sheet showing considerable profits which he falsely represented to be the balance-sheet of his firm for the preceding year. On those facts a conviction for attempting to obtain the 100*l.* from Slater by false pretences was affirmed by the Court of Criminal Appeal. But there a further act was required to be done by the defendant before he could get the 100*l.*; he had to form the company, for it was never suggested to Slater that he should part with his money except in return for shares or debentures of the company when formed.

[BRAY J. Is there any instance of a person having been convicted of attempting to obtain money by false pretences where there was no evidence of the false pretence having been made to the person intended to be defrauded or to his representative?]

(1) [1910] W. N. 122.

It is not known whether there is such a case, but it is contended that a direct communication to the person from whom the money is to be obtained, or his agent, is not necessary. It is enough if the false pretence is so made that it will presumably in the ordinary course reach that person's ears. Here it was part of the scheme that the police should be deceived into making a report of a burglary having been committed, which report, if made, the underwriters would be very likely to accept as true.

Gordon Hewart, K.C., in reply. In *Rex* v. *Linneker* (1) Walton J. said "It is clear that all acts done for the purpose of committing a crime are not attempts, for they may be merely acts of preparation"; and Kennedy J. said "Although an attempt implies the intent, an intent does not necessarily imply an attempt."

The judgment of the COURT (Lord Reading C.J., Bray and Lush JJ.) was delivered by

LORD READING C.J. This is an appeal against a conviction for an attempt to obtain money by false pretences from certain underwriters, the appeal being upon a question of law. There is little room for dispute about the facts. The prisoner was a jeweller carrying on business at Oldham. In November, 1914, he insured his stock of jewellery with underwriters at Lloyd's against burglary and theft, and a policy was issued to him covering those risks. On the morning of December 11 some policemen when passing the appellant's shop heard a shout inside from some one calling to them to open the door. They burst open the door and found the appellant bound with cords. He said that on the previous night he had put the jewellery in his safe, and was going upstairs when he was knocked down and lost consciousness. The safe was found by the police to be open and empty. The police were not satisfied with his story and took him to the police station for the purpose of his making a more definite statement; they then went back to the shop and searched the premises with the result that they found the jewellery hidden underneath the safe. When they told him of the discovery he made a confession and said

(1) [1906] 2 K. B. 99.

1915

REX v. ROBINSON.

"Being inspired by the insurance I got from the last robbery at my shop I did it to get more money from them"; and when asked where he was insured he said "Lloyd's." On those facts it was not disputed that the appellant had arranged a fraudulent scheme with the object of its being used to obtain money on the policy from the underwriters, and the only question was whether, the police having intervened and prevented its execution, the offence of attempting to obtain the money had been committed. If he had made a claim of the money from the underwriters, or had communicated to them the facts of the pretended burglary upon which a claim was to be subsequently based, he clearly could have been convicted of an attempt to obtain the money. It seems to the Court upon consideration of the authorities that there is no real difficulty in formulating the principle of law which is applicable to cases of this kind. A safe guide is to be found in the statement of the law which is laid down by Parke B. in *Reg.* v. *Eagleton* (1): "The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." The difficulty lies in the application of that principle to the facts of the particular case. In some cases it is a difficult matter to determine whether an act is immediately or remotely connected with the offence of which it is alleged to be an attempt. In other cases the question is easier of solution, as for instance in *Reg.* v. *Button*. (2) There upon the evidence there was a false pretence made directly to the race authorities with the intent to make them part with the prize, and one which, but for the fact of the fraud being discovered, would necessarily have had that effect. In the present case the real difficulty lies in the fact that there is no evidence of any act done by the appellant in the nature of a false pretence which ever reached the minds of the underwriters, though they were the persons who were to be induced to part with the money. The evidence falls short of any communication of such a pretence to the underwriters or to any agent of theirs. The police were

(1) Dears. 515, at p. 538. (2) [1900] 2 Q. B. 597.

not acting on behalf of the underwriters. In truth what the appellant did was preparation for the commission of a crime, not a step in the commission of it. It consisted in the preparation of evidence which might indirectly induce the underwriters to pay; for if the police had made a report that a burglary had taken place,—and that was presumably what the appellant intended,—it may very well be that the underwriters would have paid without further inquiry. But there must be some act beyond mere preparation if a person is to be charged with an attempt. Applying the rule laid down by Parke B., we think that the appellant's act was only remotely connected with the commission of the full offence, and not immediately connected with it. If we were to hold otherwise we should be going further than any case has ever yet gone, and should be opening the door to convictions for acts which are not at present criminal offences. We think the conviction must be quashed, not on the technical ground that no information or evidence as to the property lost was given to the underwriters as required by the policy, but upon the broad ground that no communication of any kind of the false pretence was made to them.

Appeal allowed.

Solicitors for appellant: *Magson & Nicholson, Oldham.*
Solicitor for prosecution: *Director of Public Prosecutions.*

J. F. C

1915
Jan. 27;
Feb. 5.

COMMISSIONERS OF INLAND REVENUE *v.* WHIDBORNE'S EXECUTORS.

Revenue (Land Values)—Assessable Site Value—Deductions from Total Value—Part of Total Value directly attributable to Works executed or Expenditure of a Capital Nature or Appropriation of Land by Owner to Roads—Claim for a Single Sum for Deductions—Form of Percentage of Total Value—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 1; *s.* 25, *sub-s.* 4, *clauses* (*b*) *and* (*c*).

By s. 1 of the Finance (1909-10) Act, 1910, there is to be paid on the increment value of any land a duty, called increment value duty, at the rate of 1*l.* for every complete 5*l.* of that value accruing after April 30, 1909.

By s. 25, sub-s. 4, the assessable site value of land means the total value after deducting (inter alia) any part which is directly attributable (*b*) to works executed by any person interested in the land for the purpose of improving the land as building land; and (*c*) to the appropriation of any land by any person interested in the land for the purpose of roads for the use of the public.

The owners of an estate developed it as a building estate by laying it out in plots, appropriating land forming portions of the estate for the site of roads and making up the roads:—

Held, (1.) that a part of the total value of each plot was directly attributable both to the appropriation of the land for, and to the construction of, the roads in the neighbourhood of the plot, and therefore in arriving at the assessable site value of a plot deductions for both these matters could be claimed by the owners; (2.) that a single sum in the form of a percentage of the total value of the plot could be claimed by the owner for the appropriation and construction, that sum being the part of the total value attributable on April 30, 1909, in the open market to the dedication and construction of the roads.

In a case where the facts call for only one of the deductions, i.e., if the road is dedicated but unmade, or if though the road was made by the owner of the plot he did not provide the site of it, the sums claimed for appropriation and construction respectively must be distinguished.

Petition by way of appeal on the part of the Commissioners of Inland Revenue against a decision of a referee under the Finance (1909-10) Act, 1910. (1)

The decision had reference to certain deductions claimed by the respondents to be allowable in arriving at the assessable site value of two houses known as 12 and 18, Strickland Street, Deptford, of which the respondents were owners. The two houses were admitted to be exactly similar, and for the purposes of this

(1) See note on p. 368, post.

case no distinction was sought to be drawn between them either by the appellants or by the respondents.

Strickland Street is part of an estate known as the Lucas estate, which has since 1837 been owned by members of the Lucas family and is now owned by the respondents, the executors of the Rev. G. F. Whidborne, deceased. The estate has from about 1850 onwards been developed by members of the Lucas family as a building estate by making sewers, laying out the land in plots, the appropriation of land for roads and streets, and the formation and making of the same, and but for such development the plots in question would have remained isolated pieces of agricultural land and have never been made into sites for buildings or been built upon. The estate is traversed in different directions by numerous streets, the names of such of the streets as are in the neighbourhood of 12, Strickland Street being set out in Form 7 hereinafter referred to.

Form 7 upon which the respondents claimed for site value deductions with the particulars furnished by them was (so far as material) as follows:

CLAIM FOR SITE VALUE DEDUCTIONS.

PARTICULARS TO BE FURNISHED BY AN OWNER OF LAND, OR PERSON RECEIVING RENT IN RESPECT OF LAND, WHO DESIRES TO CLAIM DEDUCTIONS IN ARRIVING AT THE ASSESSABLE SITE VALUE OF THE LAND.

When completed, the claim should be delivered or sent in the accompanying franked envelope to the District Valuer, 1, Lewisham Hill, S.E.

1. Name, description, and precise situation of land . . .	12, Strickland Street.

5. Portion of the total value directly attributed to:—

(a) *Works Executed.*

Date when Executed.	By whom executed and Nature of his Interest in the Land.	Particulars of Works.	Amount Expended on Works.	Value directly attributable thereto.
			£	£
1859 and subsequent years.	J. J. S. S. Lucas, Mrs. Rose Whidborne, G. F. Whidborne, all owners in fee simple and ground lessees.	Roads, viz.:— St. John's Road, Ravensbourne Road, Elverson Road, Batsford Street, sewers under Ravensbourne Road and Strickland Street and sewers on the estate.	8000.	See covering letter.

1915

INLAND REVENUE COMMISSIONERS v. WHIDBORNE'S EXECUTORS.

(b) *Expenditure of a Capital Nature (including Expenses of Advertisement).*

Date of Expenditure.	By whom executed and Nature of his Interest in the Land.	Particulars of Expenditure.	Amount Expended.	Value directly attributable thereto.
As above in (a).	As above in (a).	Expenditure on above.	£ As above in (a).	£ See covering letter.

6. Portion of the total value directly attributable to the appropriation of any land or to the gift of any land for streets, roads, paths, squares, gardens, or other open spaces for the use of the public:—

Date.	Name of Person making the Appropriation or Gift and Nature of his Interest.	Particulars of Appropriation or Gift.
As above in (a).	The above fee simple owners.	Appropriation of land to the above roads.

The covering letter which together with Form 7 was sent to the district valuer by the respondents' solicitors was (so far as material) as follows: "You will see that the three matters referred to under the heads of section 25, sub-section 4 (*b*) and (*c*), are closely connected, and we are advised that it is practically impossible to split up the part of the total value on April 30th, 1909, of No. 12 Strickland Street attributable to these matters among the three heads mentioned in sub-sections (*b*) and (*c*). Indeed, we believe and are advised that the value to be attributed to these heads jointly can only properly and practically be summed up in one sum. We are advised that, of the total value of 270*l.* on April 30th, 1909, 45*l.* are directly attributable to the works, the expenditure, and the appropriation mentioned in the particulars in Form 7."

Form 7 filled in by the respondents with similar particulars together with a covering letter in similar terms was sent in respect of No. 18, Strickland Street.

The respondents claimed before the Commissioners and the referee deductions in respect of that part of the total value of No. 12, Strickland Street which was directly attributable to the

appropriations of, and works executed upon, the roads mentioned in Form 7.

They made an exactly similar claim in respect of No. 18, Strickland Street.

It was agreed that the gross value in each case was 270*l.* and the deductions to be made therefrom to arrive at the full site value amounted to 180*l.*, so that the full site value was 90*l.*, and the respondents' witnesses alleged before the referee that 50 per cent. of that value ought to be allowed under s. 25, sub-s. 4, clauses (*b*) and (*c*), as being attributable to the appropriation of the land for, and the construction of, the roads mentioned in Form 7, i.e., 45*l.* The Commissioners' witnesses alleged that the fair share of the value of the work done on the roads, including sewerage, attributable to No. 12, Strickland Street was ascertained by allowing 1*l.* per foot frontage, amounting to 16*l.*, which the Commissioners were willing to allow, and that nothing was attributable to the appropriation of the roads. They made the same allegation with regard to 18, Strickland Street. As there were no fixed charges, the total value was the same as the gross value, i.e., 270*l.*

It was not disputed that the whole of the roads in respect of which the claims were made occupied sites given by the respondents or their predecessors, and the case further proceeded upon the footing that they had made the roads. The 8000*l.* mentioned in Form 7 as having been expended on the preparation of the roads was admitted to be an estimate of which a sum of approximately 2100*l.* was expended by the owners of the estate and the balance by the local authorities, but for the purposes of the present case it was not contended that any part of the total value attributable to the existence of made roads was due to any other expenditure on them than that of the respondents.

The dates on which the various roads were taken over by the local authority were:—

St. John's Road	November 27, 1861.
Strickland Street	October 16, 1867.
Ravensbourne Road, Batsford Road	June 9, 1875.
Elverson Road	December 23, 1885.

1915

INLAND REVENUE COMMISSIONERS v. WHIDBORNE'S EXECUTORS.

The referee, after having heard the evidence of experts and viewing the property, duly gave the following award (so far as material to this report) with reference to No. 12, Strickland Street.

"The decision . . . . is as follows:—

Gross value, agreed	£270
Total value, agreed	£270

"I decide that an allowance ought to be made in respect of works executed, capital expenditure, appropriation of land for streets, roads, etc., under s. 25, sub-s. 4, clauses (*b*) and (*c*), and that the amount of such deductions should be 38*l.* 10s.

"I decide that the deduction from total value to arrive at assessable site value should be as follows:—

Deductions from gross value to arrive at full site value	£180	0	0
Deduction for works executed, etc., as above	£38	10	0
Total deductions	£218	10	0
Assessable site value	£51	10	0"

The award with reference to No. 18, Strickland Street was exactly the same and it is not necessary herein to set it forth.

The Commissioners appealed from the decision of the referee upon the grounds (inter alia)—

(1.) that the claim contained in Form 7 was wrong in placing together the two claims under s. 25, sub-s. 4, clause (*b*), and s. 25, sub-s. 4, clause (*c*);

(2.) that the claim under s. 25, sub-s. 4, clause (*b*), and the claim under s. 25, sub-s. 4, clause (*c*), ought to have been separately stated in the form, and a separate allowance, if any allowance at all, ought to have been made by the referee in respect of the claim under each head;

(3.) that the allowance of 16*l.* made by the Commissioners was sufficient in respect of the claim under s. 25, sub-s. 4, clause (*b*);

(4.) that on the facts of this case there was no claim under s. 25, sub-s. 4, clause (*c*), inasmuch as in the case of such an estate as the one in question mere appropriation apart from works executed creates no value;

(5.) that upon the true construction of the Finance (1909-10)

Act, 1910, and upon the facts of the case the allowance of 16*l.* was sufficient. The petitioners therefore prayed that it might be ordered that the decision of the referee so far as appealed against should be reversed or varied and that it might be declared that the allowance of 16*l.* given by the petitioners was sufficient.

The respondents contended that the decision of the referee was correct on the grounds (inter alia)—

(1.) that upon the correct construction of the Finance (1909-10) Act, 1910, evidence was adduced before the Commissioners upon which they should have acted showing that part of the total value of the land was directly attributable to the matters for which deductions may be claimed under s. 25, sub-s. 4, clauses (*b*) and (*c*);

(2.) that there was material to support the decision of the referee that the part of the total value of the land that was attributable to the matters mentioned in s. 25, sub-s. 4, clauses (*b*) and (*c*), was 38*l.* 10*s.* in respect of each plot;

(3.) that upon the true construction of s. 25, sub-s. 4, what has to be arrived at is the value of the land after making the deductions allowed by the section, and such deductions may be made in a single lump sum.

Sir J. A. Simon, *A.-G.*, *Sir S. O. Buckmaster*, *S.-G.*, and *W. Finlay*, *K.C.*, for the appellants. The respondents have no justification for grouping the deductions under clauses (*b*) and (*c*) of s. 25, sub-s. 4, together. They are separate heads of deduction and ought to be proved separately to the Commissioners by the respondents. The claim under clause (*b*) for works executed and expenditure of a capital nature is a legitimate head of deduction, but the correct figure in respect of that deduction is 16*l.* No deduction ought to be allowed under clause (*c*). The referee was wrong in allowing the two claims to be lumped together. He ought to have distinguished them, but he has allowed 38*l.* 10*s.* for the two lumped together. If the respondents had taken the deductions under clauses (*b*) and (*c*) separately it would have been demonstrated that there is nothing they can prove under clause (*c*). The only way in which they make it appear that

1915

INLAND REVENUE COMMISSIONERS v. WHIDBORNE'S EXECUTORS.

there is something they can claim under clause (*c*) is by confusing works executed and expenditure of capital with appropriation of land. But they are perfectly separate. The questions for the decision of the Court are whether the appellants are right in their contentions (1.) that the statutory deductions under clauses (*b*) and (*c*) must be separately claimed and proved; (2.) that as regards clause (*c*) there is nothing in the present case which can be deducted; (3.) that the correct sum in respect of the deductions under clause (*b*) is 16*l*. Clause (*b*) refers to sums of money and clause (*c*) to the appropriation of land. The fact that the statute says these two heads of deduction are to be proved to the Commissioners is in itself a good reason for holding that a separate claim must be made and proved under each of those heads. The Commissioners have to test what the claimant says, and they are therefore entitled to have the two things separate in the claim because they can then judge of it. A building estate has a certain value, and, inasmuch as no building estate can possibly be used save on the assumption that portions of it form an access, the value of any plot is not to have a deduction made in respect of the appropriation of the land as an access to the plot. The plot is just as valuable before as after there has in fact been any appropriation. The estate is capable of being cut up into a number of plots, and the market value of the estate does not depend upon the fact that any land has been appropriated to roads. It is true that some portion of the area will go into roads, just as in the case of a piece of cloth there will be certain strips or pieces which will be used up in cutting out the material; but it is not true that there is any portion of the total value of the unit, the plot, which is due to the fact of appropriation. A certain portion of the value of the building estate no doubt may be said to be concentrated or transferred to the plots which are to be built upon, but that is not due to the fact that there has been any appropriation; it is merely because it is the economical way of using the land.

If the Lucas estate were put up to auction it would fetch exactly the same sum of money before there was a square inch of it appropriated for streets as it would after it had been suitably laid out.

This is not a case where the area of land has a value, and then owing to some subsequent event, e.g., by abandoning a portion of the land, dedicating it, or giving it, an additional value in what is left, is suddenly created. In the present case the land is equally valuable whether the roads are dedicated or appropriated or not, because as in every other building estate there must be appropriation.

The fact that for the purposes of the Finance (1909-10) Act, 1910, the whole building estate is not valued, but a number of separate plots, does not make any difference. The unit is a pure matter of machinery.

The only reason why there are separate valuations is because there are separate occupations. The unit of valuation is separate occupation. If all the separate plots were occupied by one person they would be valued all together, but it cannot be that if all the plots were valued together under the statute one figure ought to be arrived at, but if each plot were valued separately and the values added up, another figure. The true construction of the statute is that which will not produce a different total. It is quite impossible from the decision of the referee to know how much is attributable to clause (*b*) and how much to clause (*c*). He may have placed a very large value on dedication of the roads and a very small one on the expenditure; and unless they are separated and made plain it is impossible for the Commissioners to proceed. The respondents have from the first alleged that it is quite impossible for them to separate the two figures. If it cannot be done, the answer is that they cannot obtain any deduction under clause (*c*) because they are quite unable to specify what part of the value which they say should be taken off is "directly attributable" to the appropriation for the roads. The claimant must be able to prove value flowing directly from the appropriation. If he says he is unable to do so and can only say that the roads have been made up and expenditure of a capital nature incurred, and that the net result is that his surveyors say that they think the value of the site has been increased by a certain percentage, then he is not entitled to obtain these deductions under the statute. If he merely guesses he is outside the statute altogether. He is not to be allowed any

1915

INLAND REVENUE COMMISSIONERS v. WHIDBORNE'S EXECUTORS.

expenditure which may indirectly increase the value; it must be something that directly increases it by appropriation of roads or public space. It ought to be possible to show that the value that has been attributable by the appropriation of roads is constant. The roads have been taken over by the local authority at various times, and the respondents cannot be entitled to say that the result of the appropriation is an increase of value, say 10 per cent. at one date but 50 per cent. at another, because the neighbourhood has increased in number and the road is more used. That increase in the user is not due to the appropriation of the road but to the growth of the population, and the increase in value is that which the statute desires to tax. The value due to the appropriation of a road must be the same from the moment it is appropriated. Clause (*c*) does not refer to a building estate being laid out and roads being cut across in various directions for the purpose of developing the plots, but to something in the nature of an appropriation of road off the estate, or the appropriation of a public square, but not the use of a part of a large building estate as a necessary means of affording access to the plots which are built upon.

It does not follow that because a piece of land is in fact appropriated and used for a road the value of the unit which has to be valued is directly increased. The respondents' witnesses do not give figures in detail. They simply say that looking at a building estate of this character and at a plot, 50 per cent. of the value of that plot is due to the appropriation of roads, and sewering, metalling, channelling, flagging, and making them up, and therefore 50 per cent. must be deducted. That evidence is wholly unsatisfactory for the purpose of forming any basis on which these figures can be reached.

Clause (*c*) is only applicable in very rare and special cases where it is possible to prove that by the appropriation of a definite piece of land of a definite value there has been an increase in the site value of the property which is the subject of valuation. That may occur in certain special cases. It might be perfectly possible to show that when a road was made a house which formerly was worth 500*l.* became worth 550*l.*; and if that were so, it might be that the purchase of that road and its gift

to the public would have increased the site value of that house by 50*l.*

In the case of a site with an open space in front of it, a valuer might well say if it had not got the advantage of the open space it would be worth so much; with the open space in front of it it is worth so much more; and this open space has added to its value. But that would be some specified piece of land like a square or a park. But the calculation cannot be made when every road which runs anywhere near the property is being dealt with. The whole of the roads over the estate that were dedicated by the respondents or their predecessors in title are being considered and brought into account in dealing with the value of each unit of the estate.

The value that is caused by increase of population is the increment value which it is the object of the statute to tax, and there can be no value attributable to roads except in so far as the roads appeal to persons.

The amount to be deducted must be determined once and for all, and can never vary. The evidence of the appellants that 1*l.* a foot frontage, i.e., 16*l.*, is sufficient to allow for all the value attributable to the works done on the roads is quite clear.

If there is to be any sum at all deducted for a road it cannot be more than the value that was created at the time when the road was appropriated. Otherwise the value would be not due to the appropriation of the road but to the use of it, which is quite a different thing. In the present case no such evidence has been before the referee. The class of appropriation which is intended to be deducted is something that is more nearly explained by considering public spaces, the gift of land for the purpose of a street, road, park, square, garden, or other open spaces for the use of the public.

If the owner has done something for the public good, and increased the value of his property by giving a cricket ground, or something of that sort, the deduction should come off. He is encouraged to do that.

It is impossible for the respondents to obtain the deductions they claim for the reason that they cannot say how much the value was increased by the dedication of the roads.

1915

INLAND REVENUE COMMISSIONERS v. WHIDBORNE'S EXECUTORS.

W. Allen, for the respondents. Sect. 26, sub-s. 1, of the Finance (1909-10) Act, 1910, shows that the owner can require his land to be subdivided for the purpose of the valuation as he chooses. But unless he so requires, each separate piece of land in the occupation of a person has to be separately valued, and forms the unit of valuation at which the valuer has to look when he values under s. 25.

In arriving at the total value of the land, i.e., the full market value, all the valuer has to consider is the particular piece of land defined by s. 26 which he is valuing; and he has to find what the market value of that would be exactly as it stands at the present time. After he has found that, he has to make certain deductions in order to arrive at the assessable site value. The two deductions that the respondents claim are (1.) the value attributable to capital expenditure and works executed by the owner, and (2.) the value attributable to land that has been given up by the owner for streets. But all the valuer has to consider in arriving at those deductions is what part of the total value of the particular piece of land which he is valuing is attributable to those matters. It is immaterial whether the land appropriated or upon which the expenditure has been made immediately adjoins the unit of valuation or not; all that is of importance is whether the expenditure has in fact increased the total value. If it has, then, if it were for the particular purposes mentioned in the section, it becomes a subject of deduction, and the valuer must take it into consideration in arriving at the site value.

The most important point is whether the respondents are in law entitled to make any deduction for the appropriation of land for streets and roads. By giving up the piece of land for the road they have created a frontage value. Suppose there is a ten-acre estate worth 300*l.* an acre and that in being developed about 30 per cent. of its value would be taken up for roads. About a third of the value of the land in respect of the roads would have been taken out of the 3000*l.*, the value of the whole estate. If the contention upon behalf of the appellants that the value of the frontages would not be increased in consequence of giving up that third of the value for roads were upheld the result would be that the owner would be left with

property worth only 2000*l.* instead of 3000*l.* But if in fact he was left with as much property after the roads had been formed and the frontages made, the value of the land given up for roads would be transferred to the frontages, which, instead of being worth 300*l.* an acre, would be worth about 450*l.* an acre. That addition in value would be directly attributable to the giving up of the land for the roads and the forming of the frontages.

The words of s. 25, sub-s. 4, clause (*c*), are as wide as possible. They are "any land . . . . for the purpose of streets, roads," &c., and are not limited to land bought outside the estate for giving access to it. The word "squares" is not an apt word for describing development outside the limits of the estate. A road consists of land and of work done on the land, and if the respondents have brought the frontage value into existence by creating the road they are, under the words of this section, entitled to have that part of the total value which is attributable to the making of the road deducted.

As to the contention that the respondents must take the expenditure on the particular portion of the road opposite to the houses and say that that represents the part of the total value that is attributable to their capital expenditure and works executed, the proper method is to consider, when the works are known, how much of the total value of the land is fairly attributable to the expenditure and the work done upon them. The actual cost of the street in front is not an indication. The correct method (assuming for the moment that the expenditure and the appropriation ought to be separated) is to consider what the value of the plot would have been if the owner had not done any of the work and what the value of the plot is in its present condition. The value of the plot as it is is its total value, and the difference between the total value that could have been got for the plot if none of the work that has been executed had been done and the total value as it is is the amount of the deduction which the owner is entitled to. The whole object of making these roads has been to develop and open up the estate and to give value to these frontages, and what the referee has to consider is how much of the total value, as it existed at the date of the valuation, is due to the work done by the owner. The referees

1915

INLAND REVENUE COMMISSIONERS v. WHIDBORNE'S EXECUTORS.

are experts chosen for their special knowledge of valuation, for the purpose of determining matters of value. In this particular case the referee has found that the value attributable both to the appropriation of land and to works executed is 38*l.* 10*s.* He has done that after hearing the evidence of experts and after viewing the property, and providing he has not gone clearly wrong in law the Court without hearing evidence would be slow to differ from his decision.

There is nothing to show that the referee has taken into consideration some matter which he has not been entitled to in arriving at the site value.

The governing idea of sub-s. 4 of s. 25 is to arrive at the assessable site value of the land.

Giving up the land and making up the road in the process of development form part of one commercial operation, and there is a greater probability that the true amount of the deduction to be allowed will be ascertained by taking the whole as one operation. It would no doubt be quite possible to give two figures, one showing the value attributable to appropriation and the other to works executed, but those two figures could only be arrived at by first ascertaining the increase in the total value and then splitting it up and making a guess. That is not necessary under the section. It is true that the deductions are split up into clauses (*a*), (*b*), (*c*), (*d*), and (*e*), but that is only for the convenience of showing them in tabular form and defining exactly what part of the total value may be deducted. There is nothing in the section that prevents the respondents taking two of those things when they are part of the same operation and saying that the part of the total value attributable to those two is so much. In clause (*d*) matters far wider apart in every sense than the making up of the road and the appropriation of the land for it are included, e.g., money expended on the redemption of land tax and on the goodwill of a business. The clauses simply give a list of deductions that may be taken from the total value in order to arrive at the assessable site value.

Sir S. O. Buckmaster, S.-G., in reply. The statute does not say that any part of the total value attributable to these matters

is to be deducted, but only any part of the total which is proved to be directly attributable to this particular purpose.

There is nothing to show at what date the 50 per cent. deduction from the total value claimed by the respondents is to be fixed, nor the value of the land dedicated, and no evidence that the value which they seek to have deducted is directly attributable to the appropriation of the land. Land without the road but with the power of making the road is exactly the same as the land with the road, the only difference being the cost of construction. Clause (*c*) only applies where the owner can show that entirely outside the building estate he has dedicated to the public use a piece of land as a road, and that by doing that he has directly enhanced the value of the site which is the subject of valuation. The mere conversion of a possibility of laying out a road into reality does not alter the value of the site.

Cur. adv. vult.

Feb. 5. The following judgment was read by

ROWLATT J. This is an appeal as to site value deductions in respect of two houses, 12 and 18, Strickland Street, in the parish of Deptford South. The same considerations affect both houses, and it is sufficient to speak only of one. They both form part of a large estate which I was told was laid out for building and built upon during a period commencing about sixty years ago. The estate is traversed in different directions by numerous streets of which Strickland Street is one.

The respondents, who are the owners, claimed upon Form 7 a deduction in respect of value directly attributable to works executed and expenditure of a capital nature such as is referred to in s. 25, sub-s. 4, clause (*b*), of the Finance (1909-10) Act, 1910, and also under clause (*c*) of the same sub-section for value directly attributable to the appropriation of land for the purposes of streets. The works and expenditure were on the streets in the neighbourhood of 12, Strickland Street, and the land appropriated consisted of the sites of the same streets. No figure was given in the claim in respect of either item, but a covering letter was referred to in which it was stated that one

1915

INLAND REVENUE COMMISSIONERS v. WHIDBORNE'S EXECUTORS.

Rowlatt J.

single deduction of a named amount would be claimed for the value attributable to the combined effect of the appropriation of the sites of the streets and the works and expenditure upon them. The Commissioners admitted a deduction of 16*l.* under s. 25, sub-s. 4, clause (*b*), but contended that nothing was deductible under clause (*c*). The owners claimed 45*l.* under the two clauses together and in their evidence before the referee dealt with the matter in the same way.

The referee has allowed 38*l.* 10*s.* under the two clauses without distinguishing the amount he allows under each.

It was not disputed that the whole of the roads in respect of which the claim for deductions was made occupied sites given by the respondents or their predecessors, and the case further proceeded upon the footing that they had made the roads. It seems that in fact a great deal of money has been spent by the local authorities on the roads, but in this case it is not suggested that any part of the total value due to the existence of made roads was due to any other expenditure on them than that of the respondents.

The points in the case are (1.) whether the deduction in respect of clauses (*b*) and (*c*) of s. 25, sub-s. 4, is to be disallowed because claimed and awarded in a single sum, and if not, (2.) whether any deduction under clause (*c*) can be supported in this case.

It seems to me clear that in making his claim the landowner must claim under (*b*) and (*c*) specifically if he is going to put forward a case under both of them, and he must indicate his case under each. Of course he may claim only under one, and if he does so he must say which. But he may think himself entitled to a certain sum as a deduction and not be sure to which head it may be decided that it is attributable or whether it will be attributed partly to one and partly to the other and if so in what proportions. Under those circumstances I cannot doubt that he would be entitled to say that he claims it all under (*b*) and alternatively all under (*c*).

It seems to me that is all he has done here, only he has been less artificial because he has told the Revenue exactly how he is going to put his case.

To do justice to the contention of the Crown in this respect I do not think the Attorney-General intended to make the point as one of procedure merely. His real argument was that the combination of the deductions under the two clauses in one sum in fact masked the fallacy which he contended underlay the allowance of anything under clause (*c*) at all.

Now the substance of the argument was this. It was said that no value was added by the appropriation of soil to roads, because the value of a building estate before actual development depended upon the supposition that roads would be cut through it and neither the actual pegging out of the sites of the roads nor the dedication of those sites made any difference to the value of the property: it only concentrated the value on the plots left between the roads. This is all perfectly true of the whole estate in the past as undivided, but the statute is dealing with the present plot, and the increase of value of each plot by reason of the concentration upon them collectively of the value of the whole estate before the roads were carved out of it is an increase of value, one would think, directly attributable to such carving out of the roads. If the plots only were offered for sale before the road was laid out and without the vendor assuming the obligation to lay out the road they would clearly not fetch the prices that they would if he did assume such obligation. The difference is the added value due to the dedication of the site of the road as distinguished from the further value added when the road is actually made up by the execution of works upon it. In truth the whole fallacy lies in putting out of sight the fact that what is to be valued is the plot after the road is made and not a larger unit comprising the plot and the site of a future road. Suppose a field valued as undivided at so much an acre is hereafter divided into building plots with intersecting roads and some of the plots are sold. On the sale an occasion for the collection of increment value duty arises as to each plot and each must be valued. Apart from any general movement in the market the plots will have absorbed into themselves the value of the roads. The Attorney-General affirms this and yet at the same time says that this added value will not be due to the appropriation of the rest of the land to roads. Apparently he would

1915

INLAND REVENUE COMMISSIONERS v. WHIDBORNE'S EXECUTORS.

Rowlatt J.

contend that the owner should pay increment value duty on this sum.

In my judgment this sum is exactly what s. 25, sub-s. 4, clause (*c*), in conjunction with the final words of s. 2, sub-s. 2, entitle the owner to deduct, and the right to do it is saved in s. 12. If it were not so, building estate development hereafter would be directly discouraged by taxation in a manner surely not consistent with the intention of the Act.

I do not see any difficulty in applying s. 25, sub-s. 4, clause (*c*), to cases like the present, and I do not appreciate how dealing with deductions under clauses (*b*) and (*c*) in one sum leads to any injustice to the Crown or perverts or obscures the issue in any way. Given the total value (which supposes the land bare) a person with adequate expert knowledge can quite well say, firstly, what the value of a plot of land would be if it had no road frontage; secondly, what the value would be with the frontage to a road site appropriated in a binding manner as a road but on which no work has yet been done; and thirdly, what it is worth with the existing frontage to a finished road. The difference between the first and the second is deductible under clause (*c*); the difference between the second and third is deductible under clause (*b*).

If the facts should call for the deduction of only one of these differences, i.e., if the road is dedicated but unmade (which must be a common case), or if though the road is made and was constructed by the owner of the plot he did not provide the site of it (which would be a rare though a possible case), then the two differences must be distinguished. Where, however, the owner has dedicated and made up the road there seems no reason why the deductions allowable should not be calculated as one by a direct comparison between the value with the made up road and the value without any road or assurance of a road at all. Why should that difference be apportioned in such a case? I cannot see any reason for it.

Some further points were raised by the Solicitor-General. In the first place he said that land appropriated upon cutting up of an estate for building for the purpose of forming streets or roads between the plots was not land appropriated for the purposes of

streets or roads within clause (*c*) of the sub-section. Inasmuch, however, as that is the very commonest case of the appropriation of land to streets or roads, and as no clue is afforded by the statute to any narrower meaning, I am unable to see how I can say that this land is not within it. He then said that there was no evidence in support of the finding of the referee inasmuch as the witnesses for the owner had only deposed to a certain percentage of the value being attributed to the appropriation of the street site and the making up of the roadway. I have already expressed the opinion that where both these elements exist there is no reason why the effect of them on the value should not be calculated together, and if that is so it is immaterial whether you say that 50 per cent. must be deducted or whether you say that of a total value of 90*l.* (the figure in this case) 45*l.* is to be deducted for these reasons. But I rather understood the Solicitor-General to suggest that this way of stating the case shows that there was in truth no value directly attributable to the appropriation of sites for streets and that it was only a surveyor's speculation, and in this connection he laid some stress upon the words "directly attributable." In one sense it is true that the evidence is a matter of speculation because there never has and never will be in the market a plot of land in this estate surrounded by the houses on the other plots but without the existing streets upon the estate. The whole of the elements of value which have to be disentangled under this section rest on hypothesis, including the total value from which the deductions have to be made. It seems to me that the step from the gross value to the total value presents more difficulties in a case like the present than the calculation of the portion of such total value which would not have existed had the plot of land supposed to be clear of its buildings been situated in the middle of the other houses without access by street. Whatever deductions the introduction of the word "direct" may have the effect of excluding, I do not think it can exclude the present deductions if clause (*c*) is to have any effect at all.

I further gathered that the Solicitor-General made some complaint as to the percentage form of stating the deduction on the ground that the part of the value attributable to the street ought,

1915

INLAND REVENUE COMMISSIONERS v. WHIDBORNE'S EXECUTORS.

Rowlatt J.

as I understood him, to have been ascertained once for all as at the time the street was appropriated, because otherwise he said the value was attributable not to the appropriation but to the growth and pressure of population. I need not enter into the vexed question as to how far value can exist at all without competition for the article to be valued because it seems quite clear that the figure to be ascertained in the present case is to be "part of the total value," and the total value represents subject to certain deductions (which distinguish it from the gross value) the value in the open market on April 30, 1909. The part of that value to be deducted must be the part attributable to the considerations in question in the same market.

For these reasons I am of opinion that the methods and principles adopted by the referee were in accordance with the Act, and I was not asked to modify the figure he arrived at merely as a figure. In the result I dismiss the appeal with costs.

Appeal dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Lucas & Sons.*

NOTE.—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 1: "Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty, at the rate of one pound for every complete five pounds of that value accruing after the 30th day of April, 1909, ..."

Sect. 2, sub-s. 1: "For the purposes of this Part of this Act the increment value of any land shall be deemed to be the amount (if any) by which the site value of the land, on the occasion on which increment value duty is to be collected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of this Part of this Act as to valuation."

Sub-s. 2: "The site value of the land on the occasion on which increment value duty is to be collected shall be taken to be—

"(*a*) where the occasion is a transfer on sale of the fee simple of the land, the value of the consideration for the transfer; . . . .

subject in each case to the like deductions as are made, under the general provisions of this Part of this Act as to valuation, for the purpose of arriving at the site value of land from the total value."

Sect. 12: "A person shall not be entitled to claim any deduction for the purpose of ascertaining the site value of any land on any occasion on which increment value duty becomes payable if the deduction is one which could have been, but was not, claimed for the purpose of ascertaining the original site value of the land."

Sect. 25, sub-s. 1: "For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise."

Sub-s. 2: "The full site value of land means the amount which remains after deducting from the gross value of the land the difference (if any) between that value and the value which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realise if the land were divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface, which are appurtenant to or used in connection with any such buildings, and of all growing timber, fruit trees, fruit bushes, and other things growing thereon."

Sub-s. 3: "The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and to any covenant or agreement restricting the use of the land entered into or made before the 30th day of April, 1909, and to any covenant or agreement restricting the use of the land entered into or made on or after that date, if in the opinion of the Commissioners the restraint imposed by the covenant or agreement so entered into or made on or after that date was when imposed desirable in the interests of the public, or in view of the character and surroundings of the neighbourhood, and the opinion of the Commissioners shall in this case be subject to an appeal to the referee, whose decision shall be final."

Sub-s. 4: "The assessable site value of land means the total value after deducting—

"(*a*) The same amount as is to be deducted for the purpose of arriving at full site value from gross value; and

"(*b*) Any part of the total value which is proved to the Commissioners to be directly attributable to works executed, or expenditure of a capital nature (including any expenses of advertisement) incurred bona fide by or on behalf of or solely in the interests of any person interested in the land for the purpose of improving the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture; and

"(*c*) Any part of the total value which is proved to the Commissioners to be directly attributable to the appropriation of any land or to the gift of any land by any person interested in the land for the purpose of streets, roads, paths, squares, gardens, or other open spaces for the use of the public; . . . ."

1915

INLAND REVENUE COMMISSIONERS *v.* WHIDBORNE'S EXECUTORS.

Sect. 26, sub-s. 1: "The Commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom, showing separately the total value and the site value respectively of the land, and in the case of agricultural land the value of the land for agricultural purposes where that value is different from the site value. Each piece of land which is under separate occupation, and, if the owner so requires, any part of any land which is under separate occupation, shall be separately valued, and the value shall be estimated as on the 30th day of April, 1909."

J. E. A.

1915

Feb. 5, 12; *March* 25.

GUNYON *v.* SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE.

Railway Company — Contract of Carriage — "Owner's Risk"—Goods consigned by Passenger Train—Carriage by Goods Train—Delay—Liability of Railway Company.

The plaintiff delivered to the defendants fruit to be carried to its destination by passenger train upon the terms of a consignment note which provided that the plaintiff, in consideration of his being charged a reduced rate below the defendants' ordinary rate for the carriage of fruit by passenger train, relieved the defendants "from all liability for" inter alia "delay . . . . except upon proof that such . . . . delay . . . . arose from wilful misconduct on the part of the" defendants' servants. The fruit was sent from the departure station in a passenger train, but in the course of transit it was transferred to a goods train in which it was carried for the rest of the journey. In consequence of this, the arrival of the fruit at its destination was delayed, and the plaintiff suffered damage:—

Held, that the carriage of the fruit by passenger train was of the essence of the contract, and after the fruit had been transferred to the goods train the contract was no longer being performed and the fruit was not being carried at owner's risk. The defendants were, therefore, not relieved from liability by the conditions in the consignment note.

Foster v. *Great Western Ry. Co.* [1904] 2 K. B. 306 distinguished.

APPEAL from the county court of Kent holden at Sittingbourne.

The action was brought to recover 4*l.* damages for loss caused by deterioration of 40 half bushels of cherries consigned by passenger train from Sittingbourne station, on the defendants' railway, to Glasgow, which consignment was sent from London onwards per goods train instead of by passenger train.

The following facts were admitted:—

(1.) That the plaintiff consigned 40 half bushels of cherries

from Sittingbourne station to James Dougherty & Sons, Glasgow, on July 2, 1914, per passenger train at reduced rates at owner's risk on the terms of a consignment note, form A.

The material parts of form A were as follows:—"South Eastern and Chatham Railway. Consignment note for perishable and other merchandise carried by passenger train or by other similar service to be carried at reduced rates at owner's risk. The South Eastern and Chatham Railway Companies' Managing Committee hereby give notice that they have two rates for the carriage of the under-mentioned merchandise, at either of which rates the said merchandise may be consigned at the sender's option; one, the ordinary rate, when the Managing Committee take the ordinary liability of a railway company; the other, a reduced rate, adopted when the sender agrees to relieve the Managing Committee and all other companies or persons over whose lines the merchandise may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay or detention, except (1.) upon proof that such loss, damage, misdelivery, delay or detention arose from wilful misconduct on the part of the Managing Committee's servants . . . .

"To the South Eastern and Chatham Railway Companies' Managing Committee. Sittingbourne Station, July 2, 1914. Receive and forward the under-mentioned merchandise, to be carried at the reduced rate, below the Managing Committee's ordinary rate, in consideration whereof I agree to relieve the South Eastern and Chatham Railway Companies' Managing Committee, and all other companies or persons over whose lines the merchandise may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the Managing Committee's servants . . . . This agreement shall be deemed to be separately made with all companies or persons parties to any through rate under which the merchandise is carried." The consignment note was signed by the plaintiff.

(2.) That the carriage of the cherries from Sittingbourne to

1915

GUNYON v. SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE.

London was by passenger train, but from London to Glasgow was made by ordinary goods train instead of passenger train, owing to the loss or absence of consignment instructions by the defendants to the Midland Railway Company.

(3.) That the cherries arrived in Glasgow on July 4, 1914, at about 7.30 A.M., and were sold by Messrs. James Dougherty & Sons by auction on the same day for 5*s.* per half bushel.

(4.) That in consequence of the cherries being carried by goods instead of passenger train a delay in delivery of twenty-four hours occurred.

(5.) That in consequence of such delay the cherries were deteriorated in value.

(6.) That a loss of 2*s.* per half bushel was sustained by the plaintiff.

The county court judge gave judgment for the defendants. He was of opinion that the decision in *Mallet* v. *Great Eastern Ry. Co.* (1) was not applicable to the facts of this case, and that the decision in *Foster* v. *Great Western Ry. Co.* (2) governed it. The plaintiff appealed.

Hohler, K.C., and *A. M. Latter*, for the plaintiff. The defendants by their contract with the plaintiff undertook that the fruit should be carried to its destination by passenger train on certain conditions exempting the defendants from liability in certain events. The defendants are not entitled to claim the benefit of those conditions if they do not perform the contract but carry the fruit by a different mode of conveyance from that agreed upon. In *Sleat* v. *Fagg* (3) a carrier received a parcel to be carried by a mail coach, but sent it by a coach of another description, and it was lost. It was held that he could not rely on a notice relieving him from liability because, as Abbott C.J. pointed out, it was "not the case of the negligent performance of the contract, but of a refusal altogether to perform it." *Garnett* v. *Willan* (4) is to the same effect. Where there is unnecessary deviation on a voyage and goods are lost in consequence, the shipowner is liable: *Davis* v. *Garrett*. (5) There may be deviation

(1) [1899] 1 Q. B. 309.
(2) [1904] 2 K. B. 306.
(3) (1822) 5 B. & Ald. 342.
(4) (1821) 5 B. & Ald. 53.
(5) (1830) 6 Bing. 716.

in the method of carriage as well as in the route. *Foster* v. *Great Western Ry. Co.* (1) is distinguishable. It is true that in that case on the latter part of the journey the goods were not carried by the particular route stipulated for, but that was done in order to minimize the effect of the delay caused by a mistake which had happened in the course of the performance of the contract. On the other hand, in *Mallet* v. *Great Eastern Ry. Co.* (2), where the goods were forwarded by a different route from that contracted for, in consequence whereof there was delay in their arrival, it was held that as the delay was not a delay in the performance of the contract the railway company were not relieved from responsibility. [*Caledonian Ry. Co.* v. *Muirhead's Trawlers* (3) and *Joseph Thorley* v. *Orchis Steamship Co.* (4) were also referred to.]

Lipson Ward, for the defendants. It cannot be said that the delay occurred by reason of something outside the contract, for the transfer of the fruit from the passenger train to the goods train occurred after the performance of the contract had begun. It was a mere breach of one of the terms of the contract, and is on the same footing as delivery to the wrong person or delivery not within a reasonable time. If the plaintiff's contention be correct the railway company could never rely on the exceptions in the consignment note in the case of delay, for every delay can be traced to a breach of contract. Great doubt was thrown on the correctness of *Mallet* v. *Great Eastern Ry. Co.* (2) in *Foster* v. *Great Western Ry. Co.* (1), and the decision can only be reconciled with the other authorities on the ground that the goods had from the very first been consigned by the wrong route, so that it could be said that the company had never entered upon the performance of the contract. In the present case the fruit was carried in accordance with the contract on the earlier part of the journey, and the delay was caused by the mistake which occurred while the fruit was in course of transit on the contract journey. In that view the case is almost identical with *Foster* v. *Great Western Ry. Co.* (1)

But assuming that the term that the fruit should be carried

(1) [1904] 2 K. B. 306.
(2) [1899] 1 Q. B. 309.
(3) (1904) 6 F. 605.
(4) [1907] 1 K. B. 660.

1915

GUNYON v. SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE.

by passenger train was of the essence of the contract, the principle that a party breaking a term which is of the essence of the contract cannot rely on the special terms of the contract only applies where the breach has been wilful or deliberate. In both *Sleat* v. *Fagg* (1) and *Garnett* v. *Willan* (2) the breach was the result of a deliberate act: see *Morritt* v. *North Eastern Ry. Co.*, per Blackburn J. (3) *Kish* v. *Taylor* (4) shows that although there may have been a breach of a condition precedent, yet unless the breach was wilful, the special terms of the contract still apply.

[LAWRENCE J. Was it not wilful misconduct to put fruit into a goods train instead of a passenger train?]

It was an accident or a mistake: see *Forder* v. *Great Western Ry. Co.* (5) and *Stevens* v. *Great Western Ry. Co.* (6) It has never been suggested that there was wilful misconduct in this case.

Hohler, K.C., in reply. The defendants are bound by their special Act (54 & 55 Vict. c. ccxx.) to give reasonable facilities for carrying fruit by passenger train. They can only carry at owner's risk if the terms are fair and reasonable, and it would be unreasonable for a contract for carriage by passenger train to provide that the railway company should not be liable if the goods were carried by goods train. It is open to the plaintiff to contend, if necessary, that the admitted facts show wilful misconduct.

Cur. adv. vult.

March 25. LAWRENCE J. read the following judgment:—In this case the plaintiff consigned forty half bushels of cherries from Sittingbourne to Glasgow by passenger train "at owner's risk" on the terms of the company's consignment note, form A. He routed the consignment per Midland Railway. The cherries were duly sent off from Sittingbourne by a passenger train of the defendant company, but from London to Glasgow they were

(1) 5 B. & Ald. 342.
(2) 5 B. & Ald. 53.
(3) (1876) 1 Q. B. D. 302, at p. 304.
(4) [1910] 2 K. B. 309.
(5) [1905] 2 K. B. 532.
(6) (1885) 52 L. T. 324.

carried by an ordinary goods train of the Midland Railway instead of by a passenger train. In consequence of this their arrival was delayed, and they were damaged to the extent of 2*s.* per half bushel. The change from passenger to goods train on transhipment in London was due to "the loss or absence of consignment instructions by the defendants to the Midland Railway Company." The learned county court judge treated the case as governed by *Foster* v. *Great Western Ry. Co.* (1), and gave judgment for the defendants.

It was argued for the defendants that the delay was not due to "wilful misconduct" within the meaning of the consignment note and that the defendants were entitled to rely on that exception. A number of cases were cited to us, and the case was very well argued. It was admitted that the term providing for carriage by passenger train was of the essence of the contract, and I think this was a necessary admission. A railway company which holds itself out to carry a particular commodity, say cherries, carries that commodity prima facie as a "common carrier" with all the liability attaching to that calling. It can by a proper special contract within s. 7 of 17 & 18 Vict. c. 31 limit those responsibilities. It is well-established law that the "owner's risk" clause can only be effective in cases in which the railway company affords the consignor an alternative rate below the general rate. The rate here was alternative to a general rate "for the carriage of fruit by passenger train or by other similar service," which of course this Midland goods train was not. So that to make "owner's risk" operative the contract must be one for carriage by passenger or equivalent train. The contract further provides that it shall "be deemed to be separately made with all companies or persons parties to any through rate under which the merchandise is carried." It is "during any portion" of this transit that the sender agrees to relieve the company from liability. It is only during the performance by the railway company of such transit that the sender can be called upon to show that his loss has arisen from the wilful misconduct of the company's servants. If the loss had arisen between Sittingbourne and London the railway company could have said the

(1) [1904] 2 K. B. 306.

1915

GUNYON v. SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE.

Lawrence J.

goods were being carried at owner's risk and could have required the plaintiff to prove either wilful misconduct or some other of the excepted perils. But when in London the cherries were shipped on a goods train this contract was no longer being performed and the goods were no longer being carried at "owner's risk." The Midland Railway Company shipped these goods upon a train to which neither the contract nor the rate of payment applied, and consequently the ordinary incidents of carriage by carrier at once became applicable. The mere fact that they were being carried over the line of rails of the Midland Railway Company does not in my opinion constitute a performance or attempted performance of this special contract. The Midland Railway Company never carried and never intended to carry at "owner's risk," for they must have known that the only valid owner's risk rate for fruit in force is one for carriage by passenger train.

I think, therefore, that *Foster's Case* (1) does not apply, for there the mistake arose at Exeter and was a mistake of the company's servants in and incidental to the performance of the contract. When the mistake was discovered at Taunton the loss and damage to the goods had accrued. Sending them at once direct to Weymouth instead of back to Exeter minimized the loss. This it was the duty of the defendants to do. The same act could not be both the discharge of a duty to the owner of the goods and wilful misconduct towards them.

This case is more like *Mallet* v. *Great Eastern Ry. Co.* (2), for there the goods were sent by the wrong route; here, they are sent by the wrong conveyance and one which involved greater delay or risk, as in *Sleat* v. *Fagg*. (3) The case of *Sleat* v. *Fagg* (3) is not directly in point except as showing that in order to avail himself of exceptions from his liability the carrier must act in performance of the contract to which the exceptions are attached and by which he is relieved from liability.

I do not propose to deal with the cases decided upon the meaning of "wilful misconduct," because I do not think the plaintiff was called upon to prove that his loss was caused by

(1) [1904] 2 K. B. 306. (2) [1899] 1 Q. B. 309.
(3) 5 B. & Ald. 342.

conduct within that exception. His task was easier; he had merely to show that the goods were not being carried in performance of a contract at "owner's risk" when the loss accrued.

For these reasons I think judgment should be entered for the plaintiff with costs here and below.

SANKEY J. read the following judgment:—I agree. The plaintiff consigned the cherries in question from Sittingbourne to Glasgow by passenger train at reduced rates and at owner's risk on the terms of the consignment note already referred to. The carriage from Sittingbourne to London was duly performed by passenger train, but from London to Glasgow it was performed by goods train. As a result the cherries arrived damaged, for which loss the plaintiff seeks to recover from the defendants, while they seek to excuse themselves under the conditions of the consignment note. Numerous cases were cited to show, either that under the old law where a carrier conveyed a parcel by a mode of conveyance different from that stipulated for, he forfeited the protection to which he would have been entitled had he conveyed it by the agreed conveyance: see *Sleat* v. *Fagg* (1); or that where a railway company is carrying goods under an owner's risk note a deviation from the route is not a performance of the contract and the company is not entitled to the agreed protection: *Mallet* v. *Great Eastern Ry. Co.* (2) I do not think it is necessary to discuss those cases, although after the remarks made by Lord Alverstone C.J., the late Wills J., and the late Kennedy L.J. in *Foster* v. *Great Western Ry. Co.* (3), I should desire to reserve any question about the correctness of the result in *Mallet* v. *Great Eastern Ry. Co.* (2)

In my view the present case falls to be decided upon wider principles. The defendants under their special Act, one of the Railway Rates and Charges Order Confirmation Acts of 1891, were entitled to carry the cherries either by goods or passenger train. If they carried them by goods train the rates for merchandise traffic included in class 2 of the Act would have been

(1) 5 B. & Ald. 342. (2) [1899] 1 Q. B. 309.
(3) [1904] 2 K. B. 306.

1915

GUNYON v. SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE.

Sankey J.

applicable and the defendants might have charged a sum for conveyance at company's risk or a smaller sum for conveyance at owner's risk. If they carried them by passenger train entirely different rates would be applicable, namely, those fixed for perishable merchandise by passenger train included in Part 5 of their Act. In respect of these rates, again, the defendants might have charged a sum for conveyance at company's risk or a smaller sum for conveyance at owner's risk. It will be seen, however, that an entirely different scale of rates is chargeable according as the goods are carried in the one or the other way. In my view the present contract was a contract for carriage of perishable merchandise by passenger train. The whole basis of the contract was the condition that the goods should be so carried. When the cherries were put into a goods train an entirely different mode of conveyance was substituted for that stipulated for, to which different rates and different conditions were applicable. The defendants from that moment departed from the agreement into which they had entered and substituted for it another one to which the exceptions for which they had contracted did not apply. I do not think that where a railway company has promised to perform the conveyance in a certain manner, with an attendant right to take advantage of certain stipulations made in their favour, they can put upon the consignor a mode of conveyance which he has not contracted for and yet retain in their own favour the stipulations referable to the agreed mode of conveyance only.

The result is that in this case the defendants were not entitled to rely upon the conditions in the consignment note, and the appeal must be allowed with costs.

Appeal allowed.

Solicitors for plaintiff: *Busk, Mellor & Norris, for Harris & Harris, Sittingbourne.*

Solicitor for defendants: *Herbert H. Groves.*

F. O. R.

ARNHOLD KARBERG & CO. *v.* BLYTHE, GREEN, JOURDAIN & CO.

THEODOR SCHNEIDER & CO. *v.* BURGETT & NEWSAM.

1915
March 18, 26.

Sale of Goods—C.i.f. Contract—Payment against Tender of Shipping Documents—Outbreak of War while Contract still executory—Effect of War on Contract—Whether Buyer bound to accept Documents.

Two contracts for the sale of beans to be shipped from Chinese ports to Naples and Rotterdam respectively each contained a provision that payment was to be in net cash in London on arrival of the goods at port of discharge in exchange for bills of lading and policies of insurance, but payment was to be made in no case later than three months from date of bills of lading or upon the posting of the vessel at Lloyd's as a total loss. The beans were shipped in July, 1914, on German vessels which on the outbreak of war between England and Germany on August 4, 1914, entered ports of refuge in the East, where they remained. At the expiration of three months from the date of the bills of lading the sellers tendered to the buyers the shipping documents, in one case a German bill of lading and an English policy of insurance, and in the other a German bill of lading and a German policy of insurance. The buyers in each case refused to accept the tender and pay the price:—

Held, that the buyers were entitled to refuse the tender inasmuch as at the date of tender the documents had, by considerations of public policy, become void and unenforceable as regards any obligations of performance after the outbreak of war, and to carry out their original obligations would involve entering into contractual relations with the King's enemies.

Esposito v. *Bowden* (1857) 7 E. & B. 763 and observations of Lord Lindley in *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, at p. 509, applied. Observations of Earl of Halsbury L.C. in *Janson's Case* at p. 493 explained.

Two awards stated by arbitrators in the form of special cases.

The following statement of facts is taken from the judgment of Scrutton J:—"The contract in each case is the London Corn Trade Association form for Chinese and Manchurian cereals. Under it there is sold a quantity of grain, with a liberty to vary it within limits to be shipped at a time specified, and place specified, at a price specified, with allowance for foreign substances to be ascertained at the port of discharge. The price is to include freight as per bill of lading and insurance; payment net

1915

ARNHOLD KARBERG & Co. v. BLYTHE, GREEN, JOURDAIN & Co.

THEODOR SCHNEIDER & Co. v. BURGETT & NEWSAM.

cash in London on arrival of the goods at port of discharge in exchange for bill of lading and policies of insurance (free of war risk) on Lloyd's conditions and including the London Corn Trade Association's f.p.a. clause effected with approved underwriters, for whose solvency seller is not to be responsible; but payment to be made in no case later than three months from date of bill of lading, or upon the posting of the vessel at Lloyd's as a total loss. In the event of war sellers are empowered to cover war risk for, and at the expense of, the buyer, if buyer does not himself insure. All average to be for sellers' account. Any deficiency on bill of lading weight to be paid for by seller, and any excess over bill of lading weight to be paid for by buyer at contract price. Should shipment be prevented by hostilities this contract or any unfulfilled part to be cancelled. Provisional invoice to be tendered within thirty days from the date of the bill of lading, unless the mail is late. But as payment was to be on arrival of goods the tender of documents and requisition of payment could not in ordinary course take place at the date of the original invoice.

"This appears to be a c.i.f. contract with the variation that the price is ultimately payable only on quantity delivered, unless the vessel is posted as lost, or three months have elapsed from date of bill of lading, in which case payment is made on bill of lading weight.

"The facts of the particular cases were as follows:

"ARNHOLD KARBERG & Co. (Sellers) *v.* BLYTHE, GREEN, JOURDAIN & Co. (Buyers).

"The sellers, found to be a firm carrying on business in England, sold to the buyers, who were also an English firm, on the contract form already set out, in May, 1914, a quantity of horse beans to be shipped from China to Naples. In July the sellers shipped beans in accordance with the contract on the German steamer *Gernis* for conveyance to Naples, the bills of lading being dated July 6 and 11 respectively. At the end of July the buyers insured part of the cargo against war risk; part, neither buyers nor sellers were able so to insure. A declaration of part numbered 835 was apparently made on July 29, and a

provisional invoice sent in on the same day; the receipt of this declaration was confirmed by the buyers on August 13. A declaration of the other part, numbered 871, was made on August 1, the provisional invoice sent in on August 12, and the receipt of this declaration was confirmed by the buyers on August 13. On October 11 the German bill of lading and an English policy were tendered to the buyers, who refused to pay. The *Gernis* was in a port of refuge in the Dutch East Indies, and is probably there still. The matter went to arbitration and the arbitrators stated a special case on the question whether the sellers were entitled to payment against such documents at the expiration of three months from the date of the bill of lading."

If the Court should answer that question in the affirmative, the buyers were to pay to the sellers the sum of 1022*l.* 18*s.* 11*d.* together with interest and the costs of the arbitration and award and special case; if the Court should answer the question in the negative, the sellers were to pay the costs of the reference and award. The arbitrators further awarded that the costs of the argument of the special case should be paid by the buyers if the question should be answered by the Court in the affirmative, and by the sellers if the question was answered in the negative.

"THEODOR SCHNEIDER & Co. (Sellers) *v.* BURGETT & NEWSAM (Buyers).

"In April, 1914, the sellers sold to the buyers, both being English firms, on the contract form already set out, a quantity of horse beans for shipment from China to a range of European ports. In July the sellers shipped beans in accordance with the contract by the German steamer *Camilla Rickmers* from Shanghai to Rotterdam, the bill of lading being dated July 21. Apparently no war insurances were effected. On August 24 the sellers sent a declaration of shipment by *Camilla Rickmers* to the buyers, who acknowledged receipt. I was not told the date of the provisional invoice. On October 21, the sellers tendered to the buyers a German bill of lading and a German policy. The buyers refused to pay. The *Camilla Rickmers* was, and probably is still, in a port of refuge in the Philippines. The matter went to arbitration; the arbitrators decided that the documents were a

1915

ARNHOLD KARBERG & Co. v. BLYTHE, GREEN, JOURDAIN & Co.

THEODOR SCHNEIDER & Co. v. BURGETT & NEWSAM.

good tender, but stated their award in the form of a special case that the opinion of the Court might be taken on the point.

"The only differences between the cases were that in the first case the policy was English, in the second German; and that in the first case two declarations and one provisional invoice were before the outbreak of war, and in the second case neither declaration nor provisional invoice was before the outbreak of war. In each case the acknowledgment of receipt or confirmation of the declaration was after the outbreak of war."

ARNHOLD KARBERG & Co. *v.* BLYTHE, GREEN, JOURDAIN & Co.

George Wallace, K.C., and *Stuart Bevan*, for Arnhold Karberg & Co. (sellers). The buyers are bound to accept and pay for the documents tendered to them. The outbreak of war did not put an end to the contract: *Janson* v. *Driefontein Consolidated Mines* (1), per Earl of Halsbury L.C., where he said (p. 493): "No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended: an alien enemy cannot sue in the Courts of either country while the war lasts; but the rights on the contract are unaffected, and when the war is over the remedy in the Courts of either is restored." The only effect of the war on the contract was this: if the further performance involved trading with the enemy no action would lie against the party refusing to perform. In this case, where both parties are British merchants, trading with the enemy was not necessarily involved by the buyers accepting the tender, for they might sell the goods to a neutral. Further, the licence issued by the Board of Trade on September 25, 1914, gets rid of any possible difficulty on this head, as it provides that "British owners of cargo now lying in a neutral port in a ship owned by an enemy may for the purpose of obtaining possession of such cargo pay freight and other necessary charges to the agent of the shipowner at such port." Moreover, the parties contemplated war risk, and what has happened is a closing of the venture by war risk. War risk was the concern of the buyers.

Maurice Hill, K.C., and *Hon. M. M. Macnaghten*, for Blythe,

(1) [1902] A. C. 484.

Green, Jourdain & Co. (buyers). Under this contract the buyers were to pay on arrival of the goods at port of discharge in exchange for bills of lading and policies of insurance or three months from the date of the bills of lading, or upon the posting of the vessel at Lloyd's as a total loss. The bills of lading in exchange for which payment is due mean valid and enforceable contracts at the time of tender, documents which will entitle the buyers, if the goods are in existence, to receive them from the ship, or, if lost by the negligence of the shipowner, to sue him. In this case the bills of lading were not at the time of tender valid and enforceable contracts; they had become on the outbreak of war contracts which it was illegal for the holders to enforce by English law. The effect of war is to dissolve contracts so far as they are executory and to absolve both parties from further performance: *Esposito* v. *Bowden* (1); and per Lord Lindley in *Janson* v. *Driefontein Consolidated Mines.* (2) The Earl of Halsbury's observation in the same case which has been relied upon by the sellers must be read as referring to rights that have accrued at the date of the outbreak of war. The present case is involved in Atkin J.'s decision in *Duncan, Fox & Co.* v. *Schrempft & Bonke.* (3)

[SCRUTTON J. What effect do you give to the licence issued by the Board of Trade?]

That licence has no retrospective effect. By the time it was issued the contracts had been dissolved.

A further point should be stated: it appears from the documents, although not from the special case, that the sellers have a German partner, and are alien enemies who are therefore not entitled to claim.

George Wallace, K.C., in reply. The special case finds that the sellers are merchants carrying on business in London and the Court cannot go behind that specific finding of fact. But even if one of the partners was a German residing in Germany, a judgment given in favour of the sellers could not be enforced without leave, and on the application for leave would be the time for the buyers to take this point.

(1) 7 E. & B. 763, 783. (2) [1902] A. C. 484, at p. 509.
(3) [1915] 1 K. B. 365.

1915

THEODOR SCHNEIDER & Co. v. BURGETT & NEWSAM.

THEODOR SCHNEIDER & Co. v. BURGETT & NEWSAM.

W. Norman Raeburn, for Burgett & Newsam (buyers). In this case the arbitrators were wrong in holding that the buyers were bound to accept the tender. As to the effect of the outbreak of war on the bills of lading I adopt the argument for the buyers in the preceding case. With regard to the policy of insurance: a buyer who is only bound to pay against documents is entitled to have tendered to him a policy for the whole transit that will be effective in the sense that he can claim under it if the goods have been lost by a peril agreed to be covered: *Groom* v. *Barber*. (1) In this case if the buyers are held bound to accept the policy tendered—one issued by a German insurance company—they will be unable to recover in respect of any loss after the outbreak of the war. In *Biddell Brothers* v. *E. Clemens Horst Co.* (2) there is a passage in Kennedy L.J.'s judgment which seems to suggest that in a c.i.f. contract the policy need only be tendered if the goods have been lost in transit; but that this is not the true view is clear from the decision in *Orient Co.* v. *Brekke & Howlid* (3), where it was decided that in the case of goods sold under a c.i.f. contract, if the seller does not effect an insurance upon them for the transit, the buyer is not bound to accept them or pay their price although they arrive safely at their destination, the ground of the decision being that there was not, as the contract required, the tender of an effective policy.

R. A. Wright, for Theodor Schneider & Co. (sellers). The sellers fulfilled their contract and are entitled to be paid. In such a case regard is to be had to the character of the documents at the inception of the contract. In a contract on c.i.f. terms the seller does not guarantee that the contract will continue valid until the goods have reached the port of delivery; if they are valid in their inception, the seller has completed his part of the contract, and it is immaterial whether it becomes void or not. It is not correct to say that if the buyers in this case are bound to accept the documents they will be involved in trading with the enemy. Here, sellers and buyers are British subjects, and

(1) [1915] 1 K. B. 316. (2) [1911] 1 K. B. 934.
(3) [1913] 1 K. B. 531.

the mere fact that the documents are transferred in this country does not involve any infringement of the rule against trading with the enemy. When they get the documents the buyers can do whatever may be necessary to obtain their goods either under the licence of the Board of Trade or under a special licence. Entering into a new contractual relation with the enemy shipowners would be trading with the enemy, but the mere transfer of the documents in this country from sellers to buyers is not.

W. Norman Raeburn in reply. If the buyers are bound to accept the documents they, in order to get their goods, will necessarily have to trade with the enemy. To make a claim under the policy against the German insurance company would be trading with the enemy. In such a contract the time when the documents are tendered is the material time; in this case at that time the contract of affreightment and the policy of insurance had been dissolved.

Cur. adv. vult.

March 26. The following judgment was read:—

SCRUTTON J. In these proceedings two special cases stated by arbitrators on the same form of contract raise a question of general importance, whether when, before the outbreak of war, goods have been sold by one English firm to another on a c.i.f. contract and shipped on a German ship to a neutral port, the seller after the outbreak of war is entitled to tender, in one case the German bill of lading, in the other case the German bill of lading and a German policy of insurance, and claim the price.

[The learned judge, having stated the facts of each case as set out above, continued:] The argument for the buyers, as I understood it, was that the contract of affreightment was rendered void on the outbreak of war, or that if it were not, to become a party to it would involve trading with the enemy, which the buyer could not be required to take upon himself, and that the tender was therefore bad. The same argument applied to the policy in the second case.

The argument for the sellers varied in the two cases. Mr. Wallace for the sellers in the first case argued that the acceptance of the tender did not involve trading with the enemy, for

1915

ARNHOLD KARBERG & Co. v. BLYTHE, GREEN, JOURDAIN & Co.

THEODOR SCHNEIDER & Co. v. BURGETT & NEWSAM.

Scrutton J.

the English buyer might sell the goods and the contracts concerning them to a neutral, which would involve no trading with the enemy at all; or that under the Crown licence of September 25, 1914, to be referred to hereafter, he might pay freight and charges and get his goods from the ship in Java without trading with the enemy, in any punishable way. Mr. R. A. Wright for the sellers in the second case admitted boldly that the contract of affreightment became void on the outbreak of war, but said that this was immaterial in a c.i.f. contract. The seller undertook to ship goods in accordance with the contract on the contract voyage, and to obtain a contract of affreightment and of insurance, in accordance with his contract of sale. After that the goods and the contracts were at buyer's risk. It was immaterial that the goods were lost when the documents were tendered—*Groom* v. *Barber* (1)—and equally immaterial that the parties contracting to carry had become alien enemies or insolvent, so that the contracts were void, or unenforceable, or useless. The risk was the buyer's; he must insure against any war risks.

Such were the contentions. To deal with them requires careful analysis of the position.

The history starts with a shipment by the sellers on a German ship of goods in accordance with the contract, and the obtaining by them of valid contracts of affreightment and insurance complying with the contract. As the contract was a sale of unascertained goods by description, no property passed to the buyers at the time of shipment, or, at any rate, until the goods were unconditionally appropriated to the contract by the seller with the assent of the buyer. (See s. 18, r. 5 (1.), of the Sale of Goods Act, 1893.) In each of the special cases there was an appropriation of the goods to the contract by the seller assented to by the buyer. In the first case the appropriation was before the war on July 29 and August 1, assented to by the buyer after the war (on August 13). In the second case both appropriation and assent were after the war (on August 24). But in neither case was there an unconditional appropriation, for the seller, as I gather, took the bill of lading to his own order, and had not tendered it at the time of the appropriation. The effect of this

(1) [1915] 1 K. B. 316.

proceeding is discussed by Bramwell L.J. and Cotton L.J. in *Mirabita* v. *Imperial Ottoman Bank.* (1) I understand the effect of those judgments to be that where the seller by taking the bills of lading in his own name or to his own order has reserved the jus disponendi or power of dealing with the goods, the property does not pass on shipment, but is vested in the vendor until he receives payment from the buyer in exchange for the documents of title. If the seller has taken the bill of lading in the purchaser's name, but retains it as security for the price, the property appears to vest on the buyer's tendering the price. What must be the condition of the goods when the seller (*a*) appropriates them to the contract, (*b*) tenders documents and asks for payment, has been a subject of some discussion. In *In re Olympia Oil Co. and Produce Brokers Co.* (2), where goods which the sellers knew to be lost at the time of appropriation were appropriated to a contract, all three members of the Court held it a bad appropriation, Avory J. going further and holding it was a bad appropriation if the goods were lost at the time though the seller did not know of it. I am not sure that Shearman J., in saying that the goods were not in a deliverable state, does not mean the same thing. It is not expressly stated whether the price was c.i.f. or payable against documents, and I do not understand, as reported, the passage in the judgment of Avory J. which appears to treat a sale of goods to arrive and a sale of goods c.i.f. as the same thing. The case, however, is binding on me on the point it decides, and on that form of contract it appears to treat the existence of ship and goods at the time of appropriation as essential to its validity, at any rate if the destination of the subject-matter is known. On the other hand, in *Groom* v. *Barber* (3) Atkin J. on a c.i.f. contract held that on a tender of documents complying with the contract it was immaterial whether the goods represented by them had at the time been lost, whether there had been a prior appropriation to the contract or not. This case was not cited to the Divisional Court in the *Olympia Case* (4), and the two lines of reasoning

(1) (1878) 3 Ex. D. 164.
(2) [1915] 1 K. B. 233.
(3) [1915] 1 K. B. 316.
(4) [1915] 1 K. B. 233. The *Olympia Case* was decided before *Groom* v. *Barber*.

1915

ARNHOLD KARBERG & Co. v. BLYTHE, GREEN, JOURDAIN & Co.

THEODOR SCHNEIDER & Co. v. BURGETT & NEWSAM.

Scrutton J.

hardly appear consistent. I do not think it is necessary for me in the present case to decide between them, for here the goods were in existence. But I am strongly of opinion that the key to many of the difficulties arising in c.i.f. contracts is to keep firmly in mind the cardinal distinction that a c.i.f. sale is not a sale of goods, but a sale of documents relating to goods. It is not a contract that goods shall arrive, but a contract to ship goods complying with the contract of sale, to obtain, unless the contract otherwise provides, the ordinary contract of carriage to the place of destination, and the ordinary contract of insurance of the goods on that voyage, and to tender these documents against payment of the contract price. The buyer then has the right to claim the fulfilment of the contract of carriage, or, if the goods are lost or damaged, such indemnity for the loss as he can claim under the contract of insurance. He buys the documents, not the goods, and it may be that under the terms of the contracts of insurance and affreightment he buys no indemnity for the damage that has happened to the goods. This depends on what documents he is entitled to under the contract of sale. In my view, therefore, the relevant question will generally be not "what at the time of declaration or tender of documents is the condition of the goods?" (and, in this, I agree with Atkin J. in *Groom* v. *Barber* (1)) but "what, at the time of tender of documents, was the condition of those documents as to compliance with the contract of sale?" I refer to the careful statement of the effect of such a contract by Hamilton J. in *Biddell* v. *E. Clemens Horst Co.* (2) It is true that in the contract in question in this case the goods must usually arrive to fix the price, but they clearly need not when the ship is posted as lost, and I think, if they have not arrived by the expiration of three months after the bill of lading date, the price is payable against the tender of proper documents, whether the goods will ever arrive or not.

I next address myself to consider, when the documents were tendered in these cases three months after the date of bill of lading and payment demanded against them, what condition and validity of these documents were required to make them a good tender.

(1) [1915] 1 K. B. 316. (2) [1911] 1 K. B. at p. 220.

1915

ARNHOLD KARBERG & Co. v. BLYTHE, GREEN, JOURDAIN & Co.

THEODOR SCHNEIDER & Co. v. BURGETT & NEWSAM.

Scrutton J.

On August 4 war broke out between England and Germany. In the first case, the contract of affreightment obtained was with a German shipowner; in the second case, both contract of affreightment and policy were with German subjects. What, in English Courts, is the effect of the outbreak of war on these contracts? The contract of affreightment was on August 4 partly executed, partly executory. No claim had then accrued on the policy of insurance for loss before the war. On this point, I have the authority of the Court of Exchequer Chamber in *Esposito* v. *Bowden* (1), where Willes J. says: "As to the mode of operation of war upon contracts of affreightment, made before, but which remain unexecuted at, the time it is declared, and of which it makes the further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it." In that case the contract of affreightment was between an Italian shipowner and an English charterer to carry goods from Russia, and war had broken out between England and Russia, and the trading with the enemy involved was an English subject's purchasing a cargo in Russia, and dealing with the Russian custom house and Russian lightermen to get it exported. The illegality here is more direct as the two parties to the contract of affreightment are subjects of countries at war and part of the contract on each side is unperformed. The judgment in *Esposito* v. *Bowden* (2) is based on the Prize Court decision of *The Hoop* (3), where Sir William Scott said (p. 198): "In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all subjects trading with the public enemy, unless with the permission of the Sovereign, is interdicted"; and again (p. 216): "The rule has been rigidly enforced . . . . where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities." This judgment and statement of the law were adopted by the Common Law Courts in 1800 in *Potts* v. *Bell* (4), where Lord Kenyon said "it might now be taken

(1) 7 E. & B. at p. 783.
(2) 7 E. & B. 763.
(3) (1799) 1 C. Rob. 196.
(4) (1800) 8 T. R. 548, at p. 561.

1915

ARNHOLD KARBERG & CO. v. BLYTHE, GREEN, JOURDAIN & CO.

THEODOR SCHNEIDER & CO. v. BURGETT & NEWSAM.

Scrutton J.

for granted that it was a principle of the common law, that trading with the enemy without the King's licence was illegal in British subjects," for the reasons given in the judgment in *The Hoop*. (1) The same statement was made by Lord Lindley in *Janson* v. *Driefontein Consolidated Mines* (2), where he says: "War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading." Where, however, a claim has accrued before the war under a contract made before the war, as in case of a loss before the war on a policy of insurance, the contract is not dissolved, but the remedy suspended till the close of the war. This explains Lord Halsbury's apparently general statement at p. 493 of *Janson* v. *Driefontein Consolidated Mines* (3) that "No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended: an alien enemy cannot sue in the Courts of either country while the war lasts; but the rights on the contract are unaffected, and when the war is over the remedy in the Courts of either is restored." This is true of a right to recover vested before the war, which was the state of things in the *Driefontein Case* (3), but was not true on the existing authorities, which Lord Halsbury cannot have meant to overrule without reference to them, in the case of contracts to be executed at the time of the outbreak of war. It follows, therefore, that on August 4 the contracts of affreightment and the policy of insurance became void except as regards claims then accrued, if any, which, however, could not be enforced during the war. What then was the position of the English owner of goods in a German ship? According to the passage in Lord Tenterden's work on Shipping (10th ed.), cited with approval by Willes J. in *Esposito* v. *Bowden* (4), "If, therefore, before the commencement of a voyage, war or hostilities should take place between the State to which the ship or cargo belongs, and that to which they are destined"—and I think the

(1) 1 C. Rob. 196.
(2) [1902] A. C. at p. 509.
(3) [1902] A. C. 484.
(4) 7 E. & B. at p. 784.

same principles must apply if the war is between the country of the shipowner and the country of the cargo owner or charterer— ". . . . the contract for conveyance is at an end, the merchant must unlade his goods, and the owners find another employment for their ship. And probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage." Apparently therefore on August 4 the goods owner could not require the German ships at Manila or the Dutch East Indies to proceed on their voyage under the contract, but could require them to deliver his goods, and the ships could not claim freight or charges under the contract which was void. I mention, to show that I have not overlooked it, that a German ship being German territory, questions might arise whether the British subject was not trading with the enemy by removing his own goods from German territory, a state of things discussed in *The Hoop*. (1) But on September 25, 1914, before the three months from the bill of lading date had expired in either case, the Board of Trade granted a licence "that British owners of cargo now lying in a neutral port in a ship owned by an enemy may for the purpose of obtaining possession of such cargo pay freight and other necessary charges to the agent of the shipowner at such port." It would follow from this that if for any reason the Courts of the neutral State refused to order the enemy ship to deliver the British cargo except upon payment of freight or charges, the British subject could do it without trading with the enemy. But it does not appear to me that this licence makes the contract of affreightment valid as to any future execution, or indeed in the past, that is since the declaration of war. When, therefore, the seller in these cases tendered documents and demanded the price, he tendered documents which had been contracts, but which were now, by considerations of public policy, void and unenforceable as regards any obligations of performance which would but for the war have been carried out after August 4. To carry out their original obligations would involve entering into contractual relations with the King's enemies; and those relations were now impossible either in England or Germany,

(1) 1 C. Rob. 196.

1915

ARNHOLD KARBERG & Co. v. BLYTHE, GREEN, JOURDAIN & Co.

THEODOR SCHNEIDER & Co. v. BURGETT & NEWSAM.

Scrutton J.

the countries of the original contracting parties. I do not suppose Hamilton J. in *Biddell* v. *E. Clemens Horst Co.* (1) had this point in his mind when he used the phrase "an insurance . . . . which will be available for the benefit of the buyer," but I cannot believe that contracts which are illegal and void can be regarded as good tenders, and available for the benefit of the buyer. It is clearly not essential that if the goods do not arrive, the buyer should have a good claim on one of the contracts, but I think it is essential that each contract should be one into which he can legally enter as a contracting party, and when the legal relations of the seller under the contract of affreightment tendered have become void, and it is illegal for the buyer to enter into any similar legal relations with shipowner or insurer, I cannot hold that such documents are good tender, or that the buyer can be required to pay against them.

I add further: (1.) that I do not think the argument that a neutral might acquire these documents and sue the German helps the matter. I do not see how void contracts can come to life by transfer to neutrals; but if they can, the buyers are not neutrals, but enemies to Germany. (2.) I do not see that the confirmation after war of the declarations helps the seller. A contract involving consequences contrary to public policy cannot be forced on the Courts by estopping the purchasers from telling the truth. A man is not estopped from pleading the Gaming Act by recognizing or confirming a bet. (3.) I think that, as valid contracts in documents were never tendered, the property in these goods never passed to the buyer. (4.) Like Atkin J. in *Duncan, Fox & Co.* v. *Schrempft & Bonke* (2), I shrink from entering the attractive field of discussion opened by the question whether the indorsement of a German bill of lading passes the contract, if any, contained in it, and if so, why it does. (5.) A point was raised that Arnhold Karberg & Co., who had one German partner, were alien enemies and could not claim. This point, if it had been material, could not in my opinion be raised on the findings in the special case, but must have been raised on a motion to enforce the award.

It follows from this judgment that in the case of *Arnhold*

(1) [1911] 1 K. B. at p. 220. (2) [1915] 1 K. B. 365, at p. 370.

1915

ARNHOLD KARBERG & CO. v. BLYTHE, GREEN, JOURDAIN & CO. THEODOR SCHNEIDER & CO. v. BURGETT & NEWSAM.

Karberg & Co. v. *Blythe, Green, Jourdain & Co.* I answer the question in the negative, and the arbitrators seem to have saved the Court the trouble of dealing with any question of costs. (1)

In *Theodor Schneider & Co.* v. *Burgett & Newsam* the Court is of opinion that the tender was not a proper tender under the contract and that the buyers are entitled to reject it, and it orders the sellers to pay the costs of the argument of the special case.

Solicitors for Arnhold Karberg & Co.: *Coward & Hawksley, Sons & Chance.*

Solicitors for Blythe, Green, Jourdain & Co.: *Armitage, Chapple & Macnaghten.*

Solicitors for Theodor Schneider & Co.: *Coward & Hawksley, Sons & Chance.*

Solicitors for Burgett & Newsam: *Thomas Cooper & Co.*

(1) On the question of the costs of the argument of the special case, Scrutton J. added: "I do not know what the arbitrators were doing by interfering with the discretion of the Court. Probably that information will be conveyed to them. They have done it in two or three cases that I have had in this paper."

J. S. H.

C. A.
1915
March 16, 17, 30.

[IN THE COURT OF APPEAL.]

BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED *v.* DUDER AND OTHERS.

[1913 B. 3930.]

Insurance (Marine)—Re-insurance—Compromise between Original Assured and Original Insurers—Whether Re-insurers entitled to Benefit of Compromise.

The plaintiffs, who had insured the *Katina*, valued at 20,500*l.*, to the extent of 1500*l.* against total and/or constructive total loss only, re-insured the *Katina*, valued as in the original policy, with the defendants for 1500*l.* against total and/or constructive total loss only. The re-insurance policy did not contain the clause "to pay as may be paid thereon." During the currency of the policies the *Katina* stranded, and her owner gave notice of abandonment, alleging that she was a constructive total loss. The plaintiffs declined to accept the notice of abandonment, whereupon the owner sued them, and the action was compromised by the plaintiffs paying to the owner a sum representing 66 per cent. of the loss. The defendants were asked to agree to this compromise, but they refused to do so, alleging that there was no constructive total loss in fact. In an action by the plaintiffs against the defendants on the re-insurance policy it was found as a fact that the *Katina* was a constructive total loss:—

Held, that a contract of re-insurance was a contract of indemnity; that the defendants were entitled to the benefit of the compromise made with the owner; and that therefore the plaintiffs were only entitled to recover from the defendants 66 per cent. and not 100 per cent. of the loss together with a proper proportion of the expense of obtaining the compromise.

Uzielli v. *Boston Marine Insurance Co.* (1884) 15 Q. B. D. 11 discussed.

Judgment of Bailhache J. [1914] 3 K. B. 835 reversed.

APPEAL from the judgment of Bailhache J. at the trial of the action in the commercial list without a jury; reported [1914] 3 K. B. 835.

The action was brought upon two time policies of re-insurance dated January 23, 1913, on the hull and machinery of the steamship *Katina*, valued at "20,500*l.* or v. o. p." (value original policy), for twelve months from December 13, 1912. The policies were in the same form; one was for 850*l.*, the other

for 650*l*. They were against total and/or constructive total loss only, warranted free from all average and salvage charges.

The plaintiffs were original insurers to the extent of 1500*l*. under a time policy dated December 31, 1912, on the hull and machinery of the *Katina* valued at 20,500*l*., for the same period as in the re-insurance policies. This policy was an f. p. a. policy, but covered collision damage. The re-insurance policies did not contain the clause "to pay as may be paid thereon."

The *Katina* stranded off Hartland Point on May 23, 1913, and notice of abandonment was duly given. It was not accepted, but the underwriters agreed to treat the matter as though a writ had been issued. The *Katina* was eventually got off and taken to a place of safety. It was a doubtful question whether the vessel was a constructive loss, and an agreement was arrived at between the owners and the underwriters other than the plaintiffs by which the owners agreed to accept 66 per cent. of their claim for a constructive total loss of the vessel, The defendants were asked by the plaintiffs to agree to this compromise, but they refused upon the ground that the vessel was not a constructive total loss. The plaintiffs, in consequence of the defendants' refusal, at first declined to join the other underwriters in the compromise, and the owners brought an action against them claiming for a constructive total loss. The plaintiffs settled the action on the terms of paying 66 per cent. of the claim and the owners' costs, and they brought this action against the defendants claiming payment in full under the re-insurance policies. The defendants denied that the *Katina* was a constructive total loss, and contended that, if the *Katina* was a constructive total loss, they were only liable to the plaintiffs for the amount of the loss which the latter had paid, namely, 66 per cent., and not for 100 per cent.

Bailhache J. found as a fact that the *Katina* was a constructive total loss, and he held that the defendants were not entitled to the benefit of the compromise made with the owners, and were liable to the plaintiffs for the full amount of the re-insurance (subject to certain allowances as to which no question arose).

C. A. 1915

BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED v. DUDER.

The defendants appealed, the notice of appeal stating that they accepted and did not appeal from so much of the judgment as found that the *Katina* was a constructive total loss, but only against so much of the judgment as held that the plaintiffs, having paid on the claim of their assured a sum less than 100 per cent. of the insured amount, could recover 100 per cent. of the amount re-insured by the defendants on the policies sued on.

Maurice Hill, K.C., and *F. D. MacKinnon, K.C.*, for the defendants. The plaintiffs can only recover the 66 per cent., at which figure they compromised their liability in respect of the constructive total loss of the ship. A contract of marine insurance is a contract of indemnity: *Burnand* v. *Rodocanachi* (1), per Lord Blackburn; *Castellain* v. *Preston*. (2) In the latter case Brett L.J. said (at p. 386): "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only." Cotton L.J. (at p. 394) cites with approval the observation of Lord Blackburn in *Burnand* v. *Rodocanachi* (1); and Bowen L.J. said (at p. 397) that a fire policy "is quite as much a contract of indemnity as a marine insurance is: the differences between the two are caused by the diversity of the subject-matters . . . . both are contracts of indemnity. Only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss." He also said (at p. 398) that no more could be recovered by the assured than the amount of the loss; and (at p. 402) that if the assured diminished the loss he must account for the diminution to the underwriters. No doubt that was not the case of a re-insurance policy, but the principle of indemnity applies equally to a re-insurance policy as to the original policy. The cases of *In re Eddystone Marine Insurance Co.* (3) and *In re Law Guarantee Trust and Accident Society* (4) have no bearing on the present

(1) (1882) 7 App. Cas. 333, at p. 339.
(2) (1883) 11 Q. B. D. 380.
(3) [1892] 2 Ch. 423.
(4) [1914] 2 Ch. 617.

case. They were cases where the original insuring company went into liquidation and either paid nothing or only a dividend on the original policy, and they were held entitled to recover the full amount from their re-insurers. The liability, however, there remained, and those cases and similar cases in bankruptcy do not affect the present case. In *Uzielli* v. *Boston Marine Insurance Co.* (1) the difficulty is to see upon what principle the Court allowed the plaintiffs, the re-assured, to recover on the re-insurance policy 100 per cent. of the loss, when they had settled for 88 per cent. with the original assured. This difficulty was felt by Bigham J. in *Western Assurance Co. of Toronto* v. *Poole.* (2) The Court did not intend to decide anything in conflict with the earlier decision in *Castellain* v. *Preston.* (3) The plaintiffs here have settled with the shipowners upon the footing of a liability of 66 per cent. of the total loss, and the defendants have agreed to indemnify the plaintiffs against that amount. The judgment is therefore wrong. [*Chippendale* v. *Holt* (4) and Arnould on Marine Insurance, 9th ed., s. 866, were also referred to.]

Adair Roche, K.C., and *R. A. Wright*, for the plaintiffs. The defendants refused to have anything to do with the compromise of the owners' action against the plaintiffs, and now they wish to take the benefit of that compromise which the plaintiffs bought at considerable cost. The plaintiffs were liable, as Bailhache J. has found, for the full amount of the loss, but purchased a compromise at 66 per cent. of that amount. The defendants are not entitled to the benefit of that compromise. The re-insurance policies are insurances on the ship. The plaintiffs have an insurable interest in the ship by reason of their having taken a risk in respect of the ship. A policy of re-insurance is an independent contract and not a contract of indemnity: *Nelson* v. *Empress Assurance Corporation* (5); *In re Law Guarantee Trust and Accident Society.* (6) The re-assured has only to show a loss of the subject-matter of the insurance, that

(1) 15 Q. B. D. 11.
(2) [1903] 1 K. B. 376, at pp. 386—388.
(3) 11 Q. B. D. 380.
(4) (1895) 1 Com. Cas. 197.
(5) [1905] 2 K. B. 281.
(6) [1914] 2 Ch. 617, at p. 650.

C. A. 1915

BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED v. DUDER.

is, his interest in the ship, and he can recover. The policy need not be expressed to be a re-insurance policy: *Mackenzie* v. *Whitworth* (1); and the judgment of the Court of Appeal in that case, delivered by Blackburn J., shows (at p. 44) that the full amount of the loss of the subject of the re-insurance policy can be recovered. Sects. 67 and 68 of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), which merely restate the law, show that the plaintiffs can recover the full amount of the loss. In so far as a contract of re-insurance is a contract of indemnity, it is not true to say that it is a contract to indemnify against that which the original insurer has to pay. A settlement by the original insurer of the claim against him does not bind the re-insurer or affect his liability. The decision in *Uzielli* v. *Boston Marine Insurance Co.* (2) is precisely in point except that the clause "to pay as may be paid thereon" was in the re-insurance policy. But that clause weakened the case of the plaintiffs, and yet this Court held that they could recover the full 100 per cent. and not merely the 88 per cent. for which they had settled the claim against them. Moreover, in the present case the plaintiffs' interest in the ship has been valued, and when a constructive total loss happened the amount of the claim was conclusively quantified by the valuation in the policy, and the plaintiffs can recover that amount. Nor can the defendants invoke the assistance of the doctrine of subrogation. The learned judge has given the defendants the value of the wreck, to which on the principle in *Castellain* v. *Preston* (3) they are entitled. But they have nothing to do with the compromise which the plaintiffs made.

Maurice Hill, K.C., in reply. The interest of the plaintiffs is not a valued interest. The ship is valued. The two sums of 850*l.* and 650*l.* represent the maximum liability of the defendants and are not sums to be taken as the amount recoverable in case of a total or constructive total loss of the ship. With regard to *Nelson* v. *Empress Assurance Corporation* (4), Order XVI., r. 48, as to bringing in third parties, only applies to very strict contracts of indemnity, and, moreover, the judg-

(1) (1875) 1 Ex. D. 36.
(2) 15 Q. B. D. 11.
(3) 11 Q. B. D. 380.
(4) [1905] 2 K. B. 281.

ment of the Court rests as much upon convenience as upon strict law. The root principle in all contracts of insurance is that the assured shall never recover more than his loss. [He also referred to ss. 9, 16, 55, 67, 68, and 91, sub-s. 2, of the Marine Insurance Act, 1906.]

Cur. adv. vult.

March 30. BUCKLEY L.J. read the following judgment:—On December 31, 1912, the plaintiffs were original underwriters to the extent of 1500*l.* on the hull and machinery of the steamship *Katina* valued at 20,500*l.* On January 23, 1913, the plaintiffs by two policies of that date, the one for 850*l.* and the other for 650*l.*, re-insured against the risk of total and/or constructive total loss only of her hull and machinery 20,500*l.* or v. o. p., or (that is) value as in original policy. The ship stranded on May 23, 1913, off Hartland Point; and three days later the owners gave notice of abandonment. The plaintiffs contended that the ship was not a constructive total loss. The owners brought an action against the plaintiffs, and in the result that action was compromised as between those parties on the terms that the plaintiffs paid the owners 66 per cent. of liability upon the footing of a constructive total loss. The defendants were invited to come into that compromise, but declined to do so. They said that the plaintiffs must act as uninsured, and that they, the defendants, did not admit that the ship was a constructive total loss. On February 12, 1914, the plaintiffs by their solicitors wrote to the defendants a letter in the plainest terms to the effect that they had satisfied themselves that the vessel was in fact a constructive total loss, and that a settlement at 66 per cent. was very beneficial to the underwriters; and asking the defendants to come into the compromise, and stating that, if they did not do so, the plaintiffs would then prosecute their action against the defendants, claiming a constructive total loss on the re-insurance policies strictly, in accordance with their full rights on the policies, which they said entitled them to claim 100 per cent. on establishing in fact that there was a constructive total loss. The defendants adhered to the position which they had taken up, and refused to admit that the vessel

C. A.
1915

BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED v. DUDER.

Buckley L.J.

was a constructive total loss. Thereupon the plaintiffs paid the 66 per cent., and now sue the defendants on the re-insurance policies. In this action they have proved that there was in fact a constructive total loss, and upon that there is now no dispute. The question is whether the plaintiffs are entitled to 100 per cent. or 66 per cent. against the defendants. The learned judge has decided this in favour of the plaintiffs, holding that they are entitled to recover 100 per cent. The question is whether this is right.

On the one side it is said that a contract of re-insurance is a contract of indemnity, and that it is a contract of indemnity only; that the plaintiffs have in fact only had to pay 66 per cent., and cannot recover more against the defendants. On the other side it is contended that the defendants were offered an opportunity of coming into the compromise; that they refused to do so, alleging that they were liable for nothing, because (as they contended) there was not a constructive total loss; wherefore (it is contended) they cannot now have the benefit of the compromise which was obtained not in any way for them, but as a compromise of the question of constructive total loss, which has now been determined against them.

A contract of insurance and a contract of re-insurance are independent of each other. But a contract of re-insurance is a contract which insures the thing originally insured, namely, the ship. The re-insurer has an insurable interest in the ship by virtue of his original contract of insurance. The thing insured, however, is the ship, and not the interest of the re-insurer in the ship by reason of his contract of insurance upon the ship.

In *Uzielli & Co.* v. *Boston Marine Insurance Co.* (1) (a case I find it very difficult to understand) the Court of Appeal affirmed that by reason of the total loss which had occurred the original underwriter was entitled to recover from the re-insuring underwriter up to 1000*l.*, being 100 per cent. upon the amount named in the policy of re-insurance, notwithstanding that the original underwriters had settled with the owners for 88 per cent. The judgment of Brett M.R. amounts to a decision, first, that no

(1) 15 Q. B. D. 11.

more than the 1000*l.* could be recovered, because, although the re-insurers had an insurable interest exceeding their share in the value of the ship by reason of the sue and labour clause, yet the policy of re-insurance was only for 1000*l.*, and they could recover no more; and, secondly, that the sue and labour clause was not available for the benefit of the re-insurers. He left the first point at a stage at which he seems to have assumed that up to the 1000*l.* the re-insurers could recover without saying why; and then upon the second point he went on to hold that they could not recover more. I cannot find that he gives any reason why the difference between the 88 per cent. and the 100 per cent. could be recovered. Cotton L.J. says, it is true, "They are liable to this extent"—that is 1000*l.*—"by reason of the total loss which has occurred"; but I cannot find any reasoning which leads to this conclusion. His reasoning seems to be only a summary of that of the Master of the Rolls. Lindley L.J.'s judgment is rested upon "pay as may be paid thereon." I cannot think that this case is an authority for the proposition that upon a contract of re-insurance there can be recovered more than an indemnity; that the re-insurer can make a profit out of the re-insurance. In *Castellain* v. *Preston* (1) I find a principle laid down in the following passages: "The contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified": per Brett L.J. at p. 386. "If there is a money or any other benefit received which ought to be taken into account in diminishing the loss or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is": per Cotton L.J. at p. 395. "Only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss. In the course of the argument it has been sought to establish a distinction between a fire policy

(1) 11 Q. B. D. 380.

C. A. 1915

BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED v. DUDER.

Buckley L.J.

and a marine policy. It has been urged that a fire policy is not quite a contract of indemnity, and that the assured can get something more than what he has lost. It seems to me that there is no justification in authority, and I can see no foundation in reason, for any suggestion of that kind": per Bowen L.J. at p. 397. In *Burnand* v. *Rodocanachi* (1) I find Lord Blackburn saying: "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

In these passages I find a principle stated. The use of all authorities is to ascertain from them the legal principles which they affirm. In *Uzielli* v. *Boston Marine Insurance Co.* (2), having read the case more than once, I cannot find a principle. I must guide myself, therefore, by *Castellain* v. *Preston* (3) rather than by *Uzielli* v. *Boston Marine Insurance Co.* (2) Bailhache J. rested his judgment upon the proposition that the indemnity afforded by re-insurance is against liability, and not against discharge of liability. I am not able to assent to this proposition, if it means, as by the context it must have meant, that if the liability be discharged by payment of a less amount the assured by re-insurance can recover against the re-insuring underwriter the amount of the liability, although exceeding the amount paid for its discharge. There are cases, such as *In re Eddystone Marine Insurance Co.* (4) and *In re Law Guarantee Trust and Accident Society* (5), in which it would seem, until they are further considered, that the assured by way of re-insurance is recovering more than the amount he has to pay on the original insurance. They are cases, however, in which that assured by

(1) 7 App. Cas. 333, at p. 339.
(2) 15 Q. B. D. 11.
(3) 11 Q. B. D. 380.
(4) [1892] 2 Ch. 423.
(5) [1914] 2 Ch. 617.

way of bankruptcy or liquidation seems to discharge his liability by payment of a dividend to the original assured. This, however, is not the fact. Notwithstanding the payment of a dividend, the liability to the full extent remains, and out of further assets, if any, it must in law be discharged. When the estate pays only 10*s.* in the pound and recovers 20*s.* in the pound, it is not recovering in excess of a sum for which it has compromised its liability. The liability is not compromised at less than 20*s.* in the pound. The liability is still 20*s.* in the pound, and the right to recover a like sum against the re-insuring underwriter is an asset of the estate, and its proceeds must go according to the law of bankruptcy or liquidation to all the creditors in administration.

I regret to have to come to the conclusion that the defendants, who would have nothing to do with the compromise, are nevertheless entitled to the benefit of it. But it seems to me that as matter of legal right the plaintiffs cannot, even in such a state of facts as this, make a profit out of the re-insurance. For these reasons I think that the appeal must be allowed. The plaintiffs are, however, entitled to indemnity, and this is not necessarily confined to the 66 per cent. They are entitled to such further sum, if any, as is required to give them an indemnity. The costs, for instance, of obtaining the compromise at 66 per cent. should be added to the 66 per cent. I shall be prepared to hear anything that may be said as to the proper terms of an inquiry to ascertain what such further sum should be.

PICKFORD L.J. read the following judgment:—This action was brought on two policies of re-insurance on the steamship *Katina* valued at 20,500*l.* The policies were against total or constructive total loss only, and were warranted free from all average and salvage charges. The plaintiffs were original insurers of the *Katina* to the extent of 1500*l.*, the valuation being the same as in the re-insurance policies. This original policy was an f. p. a. policy, but included collision damage. The re-insurance policies were 850*l.* and 650*l.* "on hull and machinery, 20,500*l.* or v. o. p.," meaning value original policy, "being a re-insurance against the risk of total and/or constructive total loss only, warranted free

C. A. 1915

BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED v. DUDER.

Pickford L.J.

from all average and salvage charges." They did not contain the words " to pay as may be paid thereon."

The *Katina* was stranded, and suffered severe damage, and the owners gave notice of abandonment to the underwriters, who did not accept it, but agreed to treat the matter as if a writ had been issued. The *Katina* was eventually got off and taken to a place of safety. It then appeared that it was a doubtful point whether the vessel was a constructive total loss or not, and as neither party was clear on the point, they entered into negotiations, the result of which was that an agreement was come to between the owners and the underwriters by which the former agreed to accept 66 per cent. of the total claim. The defendants were asked to agree to this compromise, but they refused to do so on the ground that they considered there was no constructive total loss. The plaintiffs, in consequence of the defendants' action, declined at first to join the other underwriters in the compromise, and the owners sued them. The plaintiffs settled the action upon the terms of paying 66 per cent. and the owners' costs; and they then sued the defendants, claiming, as they had intimated that they would, 100 per cent. of the total loss. The defendants contested the claim on the ground that there was no constructive total loss, and also denied that the plaintiffs were entitled to recover for a total loss, as they were not liable and had not paid on that basis. The question of constructive total loss was decided against the defendants by Bailhache J., and they accept that part of his decision, but they appeal against so much of it as decides that they are liable to pay 100 per cent. of the loss.

There is no direct authority on the subject, and the question does not often arise, because the re-insurers generally join in the compromise; but in this case they decided to try to escape liability altogether, on the ground of there being no constructive total loss, and, if they failed on that ground, to claim the benefit of the compromise in which they refused to join. Bailhache J. has decided that they cannot claim this benefit, and the question is whether this conclusion is in accordance with the principles of marine insurance.

A contract of marine insurance is a contract of indemnity,

and a contract of re-insurance is also a contract of indemnity, though it is a contract independent of the original contract of insurance, and so not within the third party rules relating to indemnity as decided in *Nelson* v. *Empress Assurance Corporation.* (1) Bailhache J. accepts the principle that a contract of re-insurance is a contract of indemnity; but he says that it is a contract of indemnity against liability, and that he sees no more reason why a re-insurer should pay less by reason of a compromise made with the assured for the benefit of the original underwriter and not of the re-insurer than in the case where the original underwriter becomes bankrupt and pays a small dividend or none. The reference in these last words is to *In re Eddystone Marine Insurance Co.* (2) and *In re Law Guarantee Trust and Accident Society.* (3) It does not seem to me that those cases stand at all on the same footing as this. They proceed on the ground that the re-insurer has to pay the original insurer his liability, whether he has discharged it or not, and that it is immaterial to him what the original insurer does with the money. But there is no diminution of the liability; the original insurer though bankrupt is still liable for the full amount; if assets were to come in in time he could be made to pay; and even in his insolvent state, if the creditor could get judgment, he could be made to pay this particular creditor, if it were not for the bankruptcy laws, which compel an equal distribution of his assets.

In this case there is an actual diminution of the liability, and the plaintiffs could never be called upon to pay more than 66 per cent. The case of *Uzielli* v. *Boston Marine Insurance Co.* (4) was also relied upon by the plaintiffs. The case is very hard to understand, and does not decide the point in this case. The plaintiffs there had paid 88 per cent. for a total loss, and 24 per cent. for suing and labouring; and Mathew J. had given judgment against the defendants for 112 per cent. The Court of Appeal held that the suing and labouring clause did not apply to that re-insurance, and gave judgment for 100 per cent. The judgment of the Master of the Rolls does not, in my opinion, touch this point; that of Lindley L.J. seems to

(1) [1905] 2 K. B. 281.
(2) [1892] 2 Ch. 423.
(3) [1914] 2 Ch. 617.
(4) 15 Q. B. D. 11.

C. A.
1915

BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED
v.
DUDER.

Pickford L.J.

me to proceed upon the words "to pay as may be paid thereon," which are not in this policy; and the only difficulty is caused by the passage in the judgment of Cotton L.J.: "As to the second point, I agree that the policy is a contract of insurance upon the ship; it is a re-insurance upon the policy issued by the French company to pay as they shall pay, but to cover a total loss only. The insurance is effected by those who are not owners, but by those who are liable in respect of the ship. What is the extent of the defendants' liability? The original insurers are liable in respect of the loss of the ship; but the defendants' liability on the policy is limited to the extent of 1000*l.*, and that is all which they can be properly called upon to pay on the policy. They are liable to this extent by reason of the total loss which has occurred." If this means that on the happening of a total loss the re-insurers are liable irrespective of whether the original underwriters are liable or not, it is, I think, inconsistent with the doctrine that they only indemnify the original insurers against their liability; and if it only means that they are liable to the extent of the original insurers' liability, it does not deal with the question whether a diminution of that liability enures for the benefit of the re-insurers. It is to be noticed that in that case the original insurers had in fact paid more than the 100 per cent., and the Court does not make it very clear why they gave judgment for more than 88 per cent. The judgment of Cotton L.J. seems rather to treat the policy there as a valued policy, and it was contended before us that the policies in this case were valued policies, valuing the plaintiffs' interest at 850*l.* and 650*l.*, and that, therefore, as soon as a total loss happened, 850*l.* and 650*l.* immediately became payable. I do not think this is so. I think they are insurances of 850*l.* and 650*l.* on the plaintiffs' interest in a ship valued at a certain sum, not insurances on a valuation of the plaintiffs' interest. As the policies are in respect of total loss only on a valued ship, the effect under ordinary circumstances is the same as a valued policy, because the original insurer is liable for the whole amount or none; but this does not seem to me to make them valued so as to exclude a consideration of the real amount of the plaintiffs' liability.

I think these policies are subject to the principles stated in *Castellain* v. *Preston* (1), where Brett L.J. says: "I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and the insurer by reason of the satisfaction of that right"; and Bowen L.J. says (2): "Then what is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect:—That a person who wishes to recover for and is paid by the insurers as for a total loss cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss, he must account for the diminution to the underwriters"; and in *Burnand* v. *Rodocanachi* (3), per Lord Blackburn. It is true that these cases were not concerned with re-insurance, but the principle of indemnity applies to it as much as to original insurance. Here the plaintiffs have obtained a diminution of their liability by compromise, and it seems to me they come within the principles stated by Brett L.J. and Bowen L.J. in *Castellain* v. *Preston* (4) just as much as if some actual thing diminishing the loss had come into their hands, as mentioned by Lord Blackburn.

I think, therefore, that the plaintiffs are not entitled to recover 100 per cent., and that the defendants are entitled to the benefit of the compromise. I do not think it very material whether it be put on the ground that the plaintiffs' liability was reduced by agreement, and that they, therefore, never became liable for more than 66 per cent., or on the ground that their legal liability was 100 per cent., but by virtue of an agreement with the shipowners they only paid 66 per cent., and that the re-insurers by subrogation became entitled to the benefit of that agreement.

(1) 11 Q. B. D. 380, at pp. 389, 390.
(2) Ibid. at p. 401, 402.
(3) 7 App. Cas. 333, at p. 339.
(4) 11 Q. B. D. 380.

C. A.
1915

BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED v. DUDER.

Pickford L.J.

I do not, however, think that they are entitled to take the benefit and refuse to contribute to the expense of obtaining it. We were told that there were expenses incurred in obtaining the compromise, but were not told what they were. *Nelson* v. *Empress Assurance Corporation* (1) shows that they are not to be measured in the same way as costs of a third party under Order XVI., r. 48; and indeed in this case it is not clear that the costs of the action brought against the plaintiffs by the shipowners were expenses of obtaining the compromise, as it seems that the plaintiffs might have secured the same terms without an action.

There must, therefore, be an inquiry as to the expenses of obtaining the compromise, unless the parties come to an agreement about them.

BANKES L.J. read the following judgment: The only question raised by this appeal is whether the respondents are entitled to recover from the appellants the whole, or only portion, of the amounts of two policies of re-insurance both dated January 23, 1913.

The only facts which need be stated are as follows: The respondents were original insurers to the extent of 1500*l.* under a time policy dated December 31, 1912, on the hull and machinery of the steamship *Katina*, valued at 20,500*l.* The respondents re-insured the risk with the appellants in so far as it related to total and/or constructive total loss by the two policies above referred to, one being for 850*l.* and the other for 650*l.* In May, 1913, the *Katina* was stranded, and the original assured claimed as against the respondents that she was a constructive total loss. The respondents refused to admit the claim, and ultimately the assured commenced an action. The matter was then compromised, the assured agreeing to accept 66 per cent. of the claim in full discharge of the respondents' liability in respect of a constructive total loss and salvage charges. The respondents had asked the appellants to join in the compromise, or at any rate to be bound by it. This the appellants refused to do, and as they persisted in the view that the vessel was not a

(1) [1905] 2 K. B. 281.

constructive total loss, the present action was commenced. Bailhache J. found that the vessel was a constructive total loss, and he accepted the respondents' contention that they were entitled to the full amount of the policy moneys, and he gave judgment for that amount (less certain allowances with regard to which no question arises). The appellants contended, and now contend, that they are liable only for the amount which the respondents, as a result of the compromise, actually paid to the original assured.

The respondents' counsel complained bitterly of the conduct of the appellants in refusing to come into the compromise; and he pointed out that as a result not only had the respondents to accept the compromise at their own risk, but they had to bring the present action at considerable cost to themselves in order to establish as against the appellants the fact that the vessel was a constructive total loss. It would be most unfair, he contended, that the appellants should be allowed any benefit where they had so unreasonably refused to shoulder any portion of the burden. From a business point of view I quite sympathize with the complaint, but I am unable to give it the legal effect for which the respondents contend, or which Bailhache J. appears to some extent to have attributed to it. In my opinion it is not possible, without losing sight altogether of the root principle of insurance law that the contract of insurance is a contract of indemnity, to accept the respondents' contention that they are entitled to ignore the compromise and claim the full amount of the re-insurance policies. I find the rule laid down in very plain terms by Lord Blackburn in *Burnand* v. *Rodocanachi*. (1) He says: "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity

(1) 7 App. Cas. at p. 339.

C. A.
1915
BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED v. DUDER.
Bankes L.J.

that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." Bailhache J. founds his judgment in the present case mainly upon two considerations. First, that the respondents bought the compromise, as he expresses it, and under the circumstances bought it for their own advantage, and not for the joint benefit of themselves and of the appellants; and consequently that the appellants are not entitled to any benefit from it. Secondly, that the contract of re-insurance is a contract of indemnity against liability, and not against discharge of liability. There is no doubt truth in both propositions, but, with respect to the learned judge, the propositions are only partially true. If the simile of a purchase is employed because a price was paid, it cannot, I think, be denied that it is a kind of purchase which does not put the purchaser into the shoes of the vendor so as to enable him to take advantage of the vendor's contract and to sue on it. In speaking of the contract of re-insurance as an indemnity against liability, and not against the discharge of liability, no account is taken of the fact that in the present case before the liability was discharged it was reduced in amount by agreement between the parties. In discussing the rights of these parties, I think that it is useful to consider what the position would be in a case where a re-insurer pays the original underwriter the full amount of his liability, and the latter, by some compromise with the original assured, afterwards reduces his liability to a less sum than he had received from his re-insurer. In such a case, upon the authority of such cases as *Castellain* v. *Preston* (1), the re-insurer would be entitled by the doctrine of subrogation to be paid back the difference between what he had paid to the original underwriter and what the latter paid to his assured, and this because the contract of re-insurance is a contract of indemnity which in the case referred to can only be given effect to by invoking the aid of the doctrine of subrogation. In my opinion, unless there is something special in the present contract excluding the operation of the principle of indemnity, the same result must follow whether the compromise precedes or follows the payment by the re-insurer; and the conduct of

(1) 11 Q. B. D. 380.

the re-insurer, however unreasonable, with reference to the compromise, cannot alter the character of the contract into which the parties originally entered.

It was contended for the respondents that in the present case the contract was a special one. It was said that the policy was a valued policy, and there having been a constructive total loss of the vessel the subject-matter of the insurance, the appellants must pay their agreed proportion of the agreed value of the vessel. I do not agree with this contention. It is true that as between the respondents and the original assured the value of the subject-matter of the insurance was agreed, and it is also true that as between the respondents and the appellants the latter had agreed to re-insure a certain proportion of the former's liability in respect of that agreed value, but that does not, in my opinion, in the events which happened, exclude the principle of indemnity. The effect of the compromise may be variously stated. It may be said that, the claim of the original assured having been compromised, there was no payment by the original insurers of any agreed fixed proportion of the agreed value. It may perhaps be said that the result of what happened was that a lower value was substituted for the one originally inserted in the policy, or that the original liability was reduced by agreement. Whatever view is taken of the compromise, the respondents cannot, in my opinion, after the compromise successfully contend that the re-insurance policies were valued policies in the sense that the respondents' claim was "conclusively quantified," to use Mr. Wright's phrase, in the policies merely because it was established that the vessel, the value of which was agreed, was a constructive total loss. To use the language of Lord Selborne in *Burnand* v. *Rodocanachi* (1), the law does not justify the use of the estoppel founded upon the valuation for any such purpose.

No case was cited to us which in my opinion supported the respondents' contention. *Mackenzie* v. *Whitworth* (2) was cited to us for the respondents as supporting their contention. I do not so read that case. So far as it has any bearing upon the question, I think that it tells against the respondents. In that case the question was whether in a policy which was really a

(1) 7 App. Cas. at p. 335. (2) 1 Ex. D. 36.

C. A. 1915

BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED v. DUDER.

Bankes L.J.

policy of re-insurance, though not so expressed, the description of the subject-matter of the insurance was sufficient. The description was "on goods" merely, the goods being cotton shipped by a New Orleans firm of Tatman & Co., insured by New York underwriters and re-insured by them with the defendants. Blackburn J., as he then was, at p. 44 speaks of the interest of the original insurer in these words. He says: "The assured here had a direct interest in the safe arrival of the cotton. . . . . It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton; and if the mode in which they acquired that interest had been stated in the policy, it would have in no way altered the effect of the defendant's contract, which would still have remained a contract to indemnify against all damage sustained by the cotton in consequence of any of the perils insured against." It is plain, from what the learned judge said on p. 42, that he was dealing with a case in which the original insurer had been called upon to pay the full amount of the damage sustained, and the point which is raised in this appeal was not therefore before the Court. The language of the learned judge is, in my opinion, important as indicating the nature of the interest of the respondents, and the character of the contract of re-insurance.

Uzielli v. *Boston Marine Insurance Co.* (1) was referred to and relied on. It is generally accepted that this case on some points is very difficult of explanation. So far as it can be regarded as any authority in the present case, I think it is important to consider the arguments presented to the Court. The original underwriters, who were re-insured by the plaintiffs, compromised the claim of the original assured at 88 per cent., but a considerable sum had been expended in getting the vessel off. The plaintiffs thereupon, as stated in the report, became liable as re-insurers to pay their proportion of the 88 per cent., and a proportion of the expenses, less the proceeds of the sale, which sums altogether amounted to a loss of 112 per cent. Mathew J. held that there had been a constructive total loss, and that the underwriters had expended more than 100 per cent. in the efforts to save the

(1) 15 Q. B. D. 11.

vessel, and he gave judgment against the defendants, who had re-insured the plaintiffs, for the full 112 per cent., although the policy was a policy for 1000*l.* only. Upon the appeal the defendants contended that their liability ought to be limited to the 88 per cent., and that they ought not to be held liable under the sue and labour clause. The plaintiffs contended that by the terms of the policy the defendants were liable to pay what the plaintiffs were liable to pay under the sue and labour clause. The point which is taken in the present case was not taken in that case. On the contrary, it appears to me to have been assumed that but for the point under the sue and labour clause the claim would have been limited to the 88 per cent. The Master of the Rolls deals with the question in this way. He says that the interest of the plaintiffs as re-insurers is the loss which they might or would suffer under the policy upon which they themselves were liable. He points out that this loss might be more than the share in the full value of the ship because of the liability under the sue and labour clause, and though he holds that the claim must be limited to the amount of the policy, namely, 1000*l.*, he apparently treats the 12 per cent., representing the difference between the 88 per cent. and the 100 per cent., as recoverable because of the position of the plaintiffs under the policy upon which they were themselves liable, and the terms of the policy under which the plaintiffs were claiming from the defendants. I share the difficulty experienced by other judges more experienced in these matters than myself in finding a satisfactory explanation of why the 12 per cent. was allowed. See per Bigham J. in *Western Assurance Co. of Toronto* v. *Poole*. (1) But, on the other hand, I do not find any trace of the point which we have to decide in this appeal having been taken or of any intention on the part of the Court to decide it.

A third case that was relied on was *Nelson* v. *Empress Assurance Corporation*. (2) That case turned upon the question whether the third party procedure should be applied as between an original insurer and his re-insurer. The Court of Appeal decided that it ought not in the particular case before it, Mathew L.J. observing that the attempt to apply the third party

(1) [1903] 1 K. B. 376, at pp. 386—388. (2) [1905] 2 K. B. 281.

C. A.
1915

BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED
v.
DUDER.

Bankes L.J.

procedure was quite a novel departure which would lead to great inconvenience owing to the two contracts being independent contracts often covering different risks, and he said that he was not prepared to create a precedent. It is true that he said also that the contract of re-insurance could not be treated as a contract of indemnity within the meaning of Order XVI., r. 48. It seems clear, from what immediately follows this statement in the judgment, that the Lord Justice had not the present case in his mind when he made the statement; and even if the statement be accepted as correct in the narrow sense in which it was used, I do not think that it is any authority in support of the respondents' contention. I need not refer in detail to *In re Law Guarantee Trust and Accident Society, Liverpool Mortgage Co.'s Case* (1), which proceeded, in my opinion, upon an entirely different principle, and I see no reason at all to suppose that Scrutton J. had the point which we are considering in his mind when he used the language to which we have been referred.

The conclusion to which I have come is that the present case is covered entirely by the principles laid down in the judgments in *Castellain* v. *Preston* (2), and that the present appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Parker, Garrett & Co.*
Solicitors for defendants: *Thomas Cooper & Co.*

(1) [1914] 2 Ch. 617, 650.
(2) 11 Q. B. D. 380.

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1915
March 5.

BLACKETT *v.* RIDOUT.

Inclosure Acts—Award—"Ancient Inclosure"—Jurisdiction of Valuer to determine—Inclosure Act, 1845 (8 *&* 9 *Vict. c.* 118), *ss.* 49, 50, 52, 105—*Allotment of Land to Ecclesiastical Corporation Sole—Sixty Years' Possession partly before and partly after Award—Title against Allottee —Real Property Limitation Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 29.

Although s. 49 of the Inclosure Act, 1845, provides that nothing in the Act shall extend to enable the valuer or the Inclosure Commissioners to determine the title of any lands, the effect of the exception of encroachments in that section is to vest solely in the valuer and the commissioners the decision of the question whether a particular encroachment is or is not an "ancient inclosure" within the meaning of s. 52, and whether therefore it is to be "deemed parcel of the land subject to be inclosed" within the meaning of s. 50; and as by s. 105 every allotment specified and set forth in an inclosure award made by the valuer and confirmed by the commissioners is "binding and conclusive on all persons whomsoever," the defence that the allotment at the time it was dealt with by the valuer was an "ancient inclosure" within s. 52 affords no answer to an action by the allottee to recover possession of it.

Where therefore by an inclosure award made in 1866 a piece of land was allotted to the rector of the parish in compensation for rights of turbary possessed by him as such rector, and the land was then in the occupation of a person who had encroached upon it some years before:—

Held, in an action brought in 1913 by the rector of the parish to recover possession of the land from the successor of the person who had originally encroached upon it, that the defendant could not set up the defence that the encroachment in question was an "ancient inclosure" at the date of the award; that the plaintiff had made out a good prima facie title by production of the award of 1866; and that, as the plaintiff was an ecclesiastical corporation sole and as the defendant and his predecessor had not been in possession for sixty years since the award, the plaintiff's right to recover possession was not barred by s. 29 of the Real Property Limitation Act, 1833.

Chilcote v. *Youldon* (1860) 3 E. & E. 7, and *Jacomb* v. *Turner* [1892] 1 Q. B. 47, discussed.

APPEAL from an order of a Divisional Court directing a new trial of an action in the county court of Dorsetshire holden at Wareham.

The action was brought by the rector of Wareham to recover possession of a parcel of land containing three acres, formerly part

C. A. 1915

BLACKETT v. RIDOUT.

of Stoborough Heath, which said parcel of land had been allotted to the Rev. Samuel Richard Capel, the then rector of Wareham, by the Inclosure Commissioners for England and Wales (1) by an inclosure award dated May 10, 1866.

The defendant gave notice that he would rely on the defence that he and his predecessors in title had been in possession of the land for the period of sixty years and that the claim was barred by a statute of limitations. (2) The action was brought in 1913.

By the inclosure award of May 10, 1866, Stoborough Heath, which had before that date been common land, was inclosed, and the three acres of land in question in this action (numbered 33 on the map attached to the award) were allotted to the Rev. Samuel Richard Capel "in respect of his right as rector of cutting and carrying away turves and furze from Stoborough Heath." The Rev. Samuel Richard Capel was succeeded in 1880 as rector of Wareham by the Rev. Pelham Stokes, and the latter was succeeded in 1888 by the plaintiff, Canon Selwyn Blackett.

At the trial in the county court before the judge with a jury it appeared that possession of the land had not been taken nor had any claim been made to the land under the award by the plaintiff or his predecessors until the present action, the plaintiff having only heard of the allotment in May, 1913, a short time before the action was brought. The plaintiff stated that he brought the action as trustee for his successors. The evidence was to the effect that the land before 1866 was open common land, that the defendant's father and the defendant lived in a

(1) By the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 48, sub-s. 1, the Inclosure Commissioners were styled the Land Commissioners, and by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2, sub-s. 1, and Sched. I., Part II., the powers and duties of the Land Commissioners under the Inclosure Acts were transferred to the Board of Agriculture, now by s. 1, sub-s. 1, of 3 Edw. 7, c. 31, styled the Board of Agriculture and Fisheries.

(2) The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 29, provides that no land shall be recovered by an ecclesiastical corporation sole after (so far as material) the period of sixty years from the time at which the right of such corporation sole, or of his predecessor, to bring such action shall first have accrued.

cottage opposite the land, and that the defendant's father and since his death the defendant occupied the land and exercised acts of ownership over it, but none of the evidence as to the possession of the land by the defendant's father or as to acts of ownership by him over it went back further than the year 1851. The defendant contended that there was evidence of possession by his father and himself for over sixty years before action brought.

At the close of the evidence on both sides it was submitted on behalf of the plaintiff that he was entitled to judgment under ss. 49, 50, and 105 of the Inclosure Act, 1845 (1), upon the

(1) 8 & 9 Vict. c. 118, s. 49: "Provided also, that nothing in this Act contained shall extend to enable the valuer, or the commissioners, or any assistant commissioner to determine the title of any lands or to determine any right between any parties contrary to the actual possession of any such party (except in cases of encroachment as hereinafter mentioned), but in case the valuer, or the commissioners, or assistant commissioner shall be of opinion against the rights of the party in possession, they or he shall forbear to make any determination thereupon until the possession shall have been given up by such party or recovered from him in due course of law, or, where the circumstances shall admit, such valuer, or the commissioners, or assistant commissioner may declare what right is appendant or appurtenant to any land or hereditament, or otherwise declare by any sufficient description the rights of the owner for the time being of any land or hereditament without declaring by name who may be the actual owner of such land or hereditament."

Sect. 50: "All encroachments and inclosures, other than inclosures duly authorised by the custom of any manor of which such land shall be parcel, or otherwise according to law, which shall have been made by any person from or upon any part of the land proposed to be inclosed, within twenty years next before the first meeting for the examination of claims in the matter of the inclosure thereof, whether any amerciament, rent, or money payment or acknowledgment shall or shall not have been paid or made in respect of the same, to or for the use of the lord of the soil or any other person, shall be deemed parcel of the land subject to be inclosed, and shall be divided, allotted and inclosed accordingly; provided always that in case, under the circumstances of any such encroachments or inclosures, it shall appear to the commissioners just or reasonable that rights or interests in the lands to be inclosed should be allowed to the persons in possession of such encroachments or inclosures, it shall be lawful for the commissioners, either in the instructions to the valuer or by any subsequent order under their seal, to direct what rights and interests, either absolute or for any limited terms or estates, should be allowed in respect of such encroachments, and the valuer shall allow and declare such rights accord-

C. A. 1915

BLACKETT v. RIDOUT.

ground that the award was conclusive as to the plaintiff's title to the land, and that the sixty years' possession would not begin to run as against the plaintiff and his predecessors, who were an ecclesiastical corporation sole, until the date of the award. The county court judge held that there was a case to go to the jury, the Inclosure Commissioners not being empowered to adjudicate in respect of the title to the land, and the jury found for the defendant.

The Divisional Court (Ridley and Bray JJ.) held that the sixty years' possession would run from the date of the award, and that therefore the defence of sixty years' possession failed; but they held, upon the authority of *Chilcote* v. *Youldon* (1), that if the encroachment by the defendant's father was an "ancient inclosure" within s. 52 of the Act the land was not subject to be inclosed and the Inclosure Commissioners had no power to allot the land to the plaintiff's predecessor. They accordingly ordered a new trial upon the point whether the encroachment was ancient or not.

---

ingly . . . . And in case any dispute or difference shall arise touching any such encroachments or inclosures, or as to the extent thereof, such dispute or difference shall be determined by the valuer."

Sect. 52: "Provided always, that all lands which shall have been inclosed from any land subject to be inclosed under this Act for more than twenty years next preceding the day of the first meeting for the examination of claims in the matter of such inclosure shall for the purposes of this Act be deemed and taken to be ancient inclosures, but not so as to carry any right of common, or compensation or allotment for or in respect of right of common which might be claimed in respect of ancient inclosures."

By s. 104 the award is to be drawn up by the valuer and confirmed by the commissioners.

Sect. 105: "Such confirmation as aforesaid shall be conclusive evidence that all the directions of this Act in relation to such award, and to every allotment, exchange, partition, and matter therein set forth and contained, which ought to have been obeyed and performed previously to such confirmation, shall have been obeyed and performed; and no such award shall be impeached by reason of any mistake or informality therein, or in any proceeding relating thereunto, or on account of any want of notices or consents required by this Act, or on account of defects or omissions in any previous proceeding whatever in the matter of the inclosure; and every allotment, exchange, partition, direction, matter, and thing specified and set forth in such award as aforesaid shall be binding and conclusive on all persons whomsoever."

(1) 3 E. & E. 7.

The defendant appealed and asked that the judgment of the county court judge should be restored, and the plaintiff gave cross-notice of appeal asking for judgment.

Beachcroft, for the defendant. The award is not conclusive of title in the person in whose favour the land is allotted. Under s. 7 of the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), which is now repealed, the commissioners were forbidden to hear and determine any dispute as to the right or title to any lands, but were to assign the allotments to the persons in possession. Sect. 49 of the Inclosure Act, 1845, expressly enacts that the valuer and commissioners shall not determine the title of any lands. They may, however, by s. 50, determine the question whether an encroachment has been made within twenty years next before the first meeting for the examination of claims, and if it has it is to be deemed part of the land subject to be inclosed. Sect. 52 provides that inclosures made more than twenty years before the first meeting for the examination of claims shall be deemed to be "ancient inclosures." They are not part of the land subject to be inclosed. In *Jacomb* v. *Turner* (1) Collins J. held that s. 105 did not make the award conclusive as to the title in the land allotted. When an allotment under an award is made of land which is in the possession of another person, no title is conferred. The allottee must eject the person in possession, and the onus is on the allottee to prove that the defendant is not in possession of an "ancient inclosure." This is borne out by the dictum of Blackburn J. in *Chilcote* v. *Youldon* (2) in the *Law Journal* report. The question whether the land was an ancient inclosure was not raised in the county court as a question to be left to the jury. The judge was asked to rule upon it as a matter of law. The only question which either party asked to be left to the jury was whether the defendant and his father had been in possession for sixty years so as to give a title to the land under s. 29 of the Real Property Limitation Act, 1833, which requires sixty years' possession to defeat the title to land of an ecclesiastical corporation sole. It is not open to the plaintiff now to raise as a question for the jury that the defendant had

(1) [1892] 1 Q. B. 47. (2) 29 L. J. (M.C.) 197, at p. 199.

C. A. 1915

BLACKETT v. RIDOUT.

not been in possession for over twenty years before 1866, so as to make the inclosure an ancient inclosure.

Next, the plaintiff in an action of ejectment must show a right to immediate possession. He must prove his title: *Danford* v. *McAnulty*. (1) By merely producing the award he has not done so. Until the valuer puts the allottee in possession of the allotment under s. 15 of the Inclosure Act, 1852 (15 & 16 Vict. c. 79), the award is merely declaratory and inchoate. By s. 13 of that Act the valuer is the person who has to obtain possession of an encroachment and not the allottee. The plaintiff had to prove his title; he only called evidence to defeat the defendant's title. The defendant showed that he and his father had been in possession of the land for sixty years, and it lay upon the plaintiff to show a better title, which he failed to do.

Edgar Foà, for the plaintiff. The plaintiff is entitled to judgment. There is no evidence to show that the encroachment took place earlier than 1851. The plaintiff showed a prima facie title by producing the award and the map annexed to it. If it was a question for the jury, it lay on the defendant to show that the inclosure was an "ancient inclosure." It would be idle to order a new trial on this point, as no more evidence could be called.

Moreover, ss. 49 and 50 show that the question whether an inclosure is an ancient inclosure is for the valuer and the commissioners to determine, subject to appeal under s. 56. Sect. 50 upon its face only deals with inclosures which are not ancient, but the valuer, in order to see if an inclosure comes within the section and is to be deemed part of the land subject to be inclosed, must determine the time within which an inclosure has existed. He has therefore jurisdiction to determine whether an inclosure has existed for more than twenty years and is an ancient inclosure. Sect. 81 bears out this view. That being so, s. 105 makes the award when confirmed by the commissioners conclusive as to every allotment; and by s. 106 all rights of any person in or upon the land allotted are extinguished. The award is therefore conclusive that the land in question allotted to the

(1) (1883) 8 App. Cas. 456.

rector of Wareham was not an "ancient inclosure," and it cannot now be questioned in any proceeding. This point was not before Collins J. in *Jacomb* v. *Turner* (1), and his dicta must be read as applicable to the case before him. In *Chilcote* v. *Youldon* (2) the question of the true construction of s. 49 was hardly discussed.

[BANKES L.J. Was not the real point in that case that there had been no award, but only a provisional order?]

That would appear to be so from the report. In any case the matter is still open in this Court. The cross-appeal should succeed and judgment should be entered for the plaintiff.

Beachcroft in reply. In *Chilcote* v. *Youldon* (2) the question of ancient inclosure was raised and tried in subsequent proceedings after the valuer had determined the question. [*Ivatt* v. *Mann* (3) was also referred to.]

BUCKLEY L.J. In this action the plaintiff sued in the county court to recover possession of three acres of land. Stoborough Heath formerly consisted of common lands. In 1866 Stoborough Heath was dealt with under an inclosure award. The land in question, which was numbered 33 on the map annexed to the inclosure award, was allotted to the Rev. Samuel Richard Capel "in respect of his right as rector of cutting and carrying away turves and furze from Stoborough Heath." The Rev. Pelham Stokes succeeded the Rev. Samuel R. Capel in the rectory of Wareham, and the plaintiff succeeded Mr. Stokes. The plaintiff as rector of Wareham is a corporation sole. The defendant raised in the county court the defence of possession for sixty years and that the claim was barred by a statute of limitations. At the trial some question, but I do not know what, was left to the jury. They found for the defendant, and judgment was given for him. The Divisional Court set aside the judgment and ordered a new trial upon one point only, namely, whether the encroachment was an "ancient inclosure" within the meaning of s. 52 of the Inclosure Act, 1845. The defendant appeals and asks for judgment. The plaintiff by cross-notice of appeal asks that judgment be entered for him.

(1) [1892] 1 Q. B. 47. (2) 3 E. & E. 7.
(3) (1842) 4 Scott, N. R. 342.

C. A. 1915

BLACKETT v. RIDOUT.

Buckley L.J.

The defendant says that the award is inchoate in that the allottee of the land never took possession of it, and nothing was done under the award. It is true that no one has taken possession under the award, but the effect of the award was to vest land in the rector of Wareham. If he remained out of possession another person could come in and by sixty years' possession acquire a title as against him. There is really nothing in the point.

I now come to the main point. The evidence is to the effect that the defendant's father from a date which was not carried further back by any of the witnesses than 1851 occupied a cottage on the opposite side of the road to the land in question, and that he did acts of ownership on the land. For instance, he built a shanty on it, and kept a brood mare there. In 1851 it was common land, being part of Stoborough Heath. There was evidence that from 1851 to 1866 the defendant's father was dealing with the land as his own and was occupying it adversely to the owner, the lord of the manor. In 1866 the inclosure award was made, and from that date onwards the person entitled to the land was the rector of Wareham. The case which the defendant made in the county court was that he had a title by adverse possession for sixty years. It is clear that he had no such title. From 1866 he and his father had possession of the land as against the rector. Before that year his father had been occupying the land in such a way that if his occupation had extended back for twenty years the encroachment would have been an "ancient inclosure." The defendant cannot claim that he and his father had sixty years' possession against any one. There were two separate periods of occupation, one before 1866 and the other since that date. They cannot be added together.

The defendant now brings forward this point, which does not seem to have been fought in the county court and upon which the Divisional Court have ordered a new trial on the ground that the real question between the parties was not tried in the county court. He says that in 1866 the land was not within the jurisdiction of the Inclosure Commissioners because his father had been in occupation for twenty years before that date, and that therefore the inclosure was an "ancient inclosure" with which

neither the valuer nor the commissioners could deal. He says that, though he does not think he can improve upon his evidence already given in the county court, and his evidence at present does not sustain him, he does not waive the point. I must therefore determine whether he can rely upon it, for the question of fact is not for me. It is necessary for this purpose to examine the provisions of the Inclosure Act, 1845. Upon the true construction of the Act it seems to me that the jurisdiction to determine whether an encroachment upon what is admitted to have been common land is an ancient inclosure is in the valuer and the Inclosure Commissioners. Sect. 49 excludes from the jurisdiction of the valuer, and of the commissioners, and of any assistant commissioner the power of determining any question of title to any lands except in the case of encroachment as thereinafter mentioned. That seems to me to mean the title to any lands in respect of which the claim is made to have an allotment of common land, and not the title to lands to be allotted under the inclosure award. It is not necessary to determine it, but that is my present opinion. Though it is not within the jurisdiction of the commissioners to determine the question of title, it is within their jurisdiction to determine the question of encroachment. I find many indications in the Act to this effect. Sect. 49 is as follows: [The Lord Justice read the section.] By that section the exclusion of the power to determine title to land does not extend to a right arising from an ancient inclosure. Sect. 50 works out the question of encroachments and inclosures made within twenty years next before the first meeting for the examination of claims. By that section all such encroachments and inclosures, with certain exceptions, shall be deemed parcel of the land subject to be inclosed, and shall be divided, allotted, and inclosed accordingly. Therefore any encroachment made within the twenty years is not to diminish the area of the land to be inclosed. The valuer or the commissioners have to determine whether the encroachment has been made within the twenty years. The matter is made even more plain by the first proviso to the section, giving power to the commissioners, if it shall appear to them just or reasonable that rights or interests in the lands to be inclosed

C. A. 1915

BLACKETT v. RIDOUT.

Buckley L.J.

should be allowed to the persons in possession of such encroachments or inclosures, to direct what rights and interests should be allowed in respect of such encroachments, and the valuer shall allow and declare such rights accordingly. The result is that the valuer or the commissioners have to ascertain whether any encroachments have been made, and if there are any whether they were made within the twenty years. If it is found that an encroachment has been made within that period the commissioners may say that it is just or reasonable that the person who has been in possession of the land for some years should be allowed certain rights or interests in the land to be inclosed. For that purpose the commissioners must determine whether the encroachment is an ancient inclosure. Sect. 52 provides that all lands which have been inclosed for more than twenty years next preceding the first meeting for the examination of claims shall be deemed to be ancient inclosures. Sect. 81 provides that the valuer shall not "allot to any other person than the proprietor thereof any land (other than encroachments and inclosures not authorized by law made within twenty years next before the first meeting for the examination of claims as aforesaid), which may be cultivated as orchard or garden," or built upon. There again there appears the exception of encroachments and inclosures made within twenty years. It seems to me that the Act has reposed in the valuer and commissioners the jurisdiction to determine as to encroachments and inclosures whether or not they have been made within the twenty years.

The case of *Chilcote* v. *Youldon* (1) has been referred to in support of the defendant's contention. There is nothing in it contrary to what I have said. In that case there was a provisional order made by the commissioners, which had not ripened into an award. The valuer found that a piece of land was in the occupation of the respondent and that it had originally been an encroachment on the common, and he sought to recover before justices possession of it under s. 13 of the Inclosure Act, 1852 (15 & 16 Vict. c. 79), as being land "deemed to be parcel of the land subject to be inclosed." The occupier alleged that the land had been inclosed

(1) 3 E. & E. 7.

more than twenty years before the first meeting for the examination of claims, and contended that it was therefore an ancient inclosure and was not subject to be inclosed. The justices found that this was proved and that the occupier could not be dispossessed without his consent. The Court held that the land, being an ancient inclosure, was not parcel of the land subject to be inclosed, and that therefore the valuer could not recover possession of it. That decision has nothing to do with the case of an award made where the claim to the land is based upon the award.

In the present case the Divisional Court in ordering a new trial were, in my opinion, wrong upon two grounds. In the first place, as I have said, the question was for the valuer and commissioners and not for the county court to determine. In the next place, if it were for the county court to determine, the defendant admits that he cannot produce any more evidence upon this point than he has already produced, and therefore there is no use in sending the case for a new trial.

By s. 105, the confirmation by the commissioners of the award drawn up by the valuer is to be conclusive evidence that all the directions of the Act have been obeyed and performed and no such award shall be impeached by reason of any mistake or informality therein; "and every allotment, exchange, partition, direction, matter, and thing specified and set forth in such award as aforesaid shall be binding and conclusive on all persons whomsoever." That being so, the plaintiff proved at the trial in the county court that the land was at one time part of Stoborough Heath, and that it had been allotted to his predecessor in the rectory by the inclosure award of the commissioners. No doubt the defendant could call upon the plaintiff to show that the grantor was capable of making the grant. He showed that by producing the award of the Inclosure Commissioners. The plaintiff made out a prima facie title by producing the award.

The appeal must be dismissed, and the cross-appeal allowed. Judgment must therefore be entered for the plaintiff.

PICKFORD L.J. I am of the same opinion. The plaintiff, the rector of Wareham, brings this action in the county court to

C. A. 1915

BLACKETT v. RIDOUT.

Pickford L.J.

recover possession of land which he claims under an award made in 1866 under the Inclosure Acts. According to the judge's notes what happened was this. The plaintiff produced the award. It was not contested that the land was originally part of Stoborough Heath, and was therefore prima facie part of the land subject to the powers of the commissioners under the Inclosure Acts. The defendant set up as a defence possession for sixty years. I do not know what question was left to the jury, but I take it that the question left to them was whether the defendant had by himself and his predecessor been in possession of the land for sixty years, and the jury found that he had. Judgment was thereupon entered for the defendant. In my opinion the judgment so entered was wrong. The award gave a title to the plaintiff in 1866, and to give a title to the defendant there must have been sixty years' possession after that date. Therefore the judgment for the defendant cannot stand.

There remains, however, the question whether the land was an "ancient inclosure" in 1866. If it was, it was not land with which the commissioners had jurisdiction to deal. If it was not an ancient inclosure, that is to say, if it was an inclosure made within twenty years next before the first meeting for the examination of claims, then it was part of the lands to be allotted under the award. That question seems to have been ignored in the county court until the last moment. If it was for the jury it ought to have been left to them. The question which we have to decide is whether it is for the jury or for the valuer and commissioners to determine. [The Lord Justice read s. 49 of the Inclosure Act of 1845.] It is said that the exception there mentioned applies only to the determination of "any right between any parties contrary to the actual possession of any such party," and not to the determination of title. I must consider what rights have to be determined in the case of an encroachment. In the first place, it has to be determined whether or not it is an ancient inclosure. If it is not, by s. 50 it is part of the land subject to be allotted under the Act, subject to the power of the commissioners, if it should appear to them just or reasonable, to direct what rights and interests should be

allowed to the person in possession of such encroachment. Therefore in order to ascertain the rights of the person in possession the valuer must inquire whether the inclosure is or is not an ancient inclosure. If that be within the power of the valuer to determine, there are sections which point out the way in which the person affected may put his case before the valuer. The valuer is to make a report, which is to be sent to the commissioners, and the valuer, under the direction of the commissioners, draws up the award, and the commissioners confirm it. By s. 105 such confirmation shall be conclusive evidence that all the directions of the Act in relation to such award have been obeyed and performed, and no such award shall be impeached by reason of any mistake or informality therein, "and every allotment, exchange, partition, direction, matter, and thing specified and set forth in such award as aforesaid shall be binding and conclusive on all persons whomsoever." In *Jacomb* v. *Turner* (1) Collins J. held that "conclusive" in s. 105 did not mean conclusive as to title to the land allotted. That decision was, no doubt, correct in the case with which the learned judge was dealing. The reasoning of that decision was that the land which was included in the award of partition was not the subject of inclosure at all and was outside the Act; that it was included in the award by mistake, none of the parties to the partition proceedings having any interest in the land; and that therefore the award could not give any title in the land to the person in whose favour it was allotted so as to oust a person who had at the date of the award acquired a good title to the land by possession. In the present case the defendant can only obtain any right under the Act. If he had an ancient inclosure, the valuer and commissioners had no power to include it in the land to be allotted. If he had not, they had the power. His rights therefore had to be determined by the valuer under s. 49. There is nothing against this view in *Chilcote* v. *Youldon* (2), because that case dealt with proceedings before the award, there having been only a provisional order for inclosure and not an inclosure award. There is therefore no question for the jury, and judgment must be entered for the plaintiff.

(1) [1892] 1 Q. B. 47. (2) 3 E. & E. 7.

C. A. 1915

BLACKETT v. RIDOUT.

BANKES L.J. I am of the same opinion. The plaintiff in bringing this action only wishes to protect the interest of his successors, not to benefit himself. The case seems to me to raise a somewhat important point under the Inclosure Act, 1845. The defendant claims that he and his father have been in possession of the land for over sixty years, partly before and partly since the inclosure award. When the case was in the county court the plaintiff's case rested entirely on the award and the map attached to it, and he said that it was conclusive of his title. The defendant in answer set up sixty years' possession. The case was fought on those lines. As a matter of fact the defendant had not sixty years' possession as against the plaintiff, because the award was in 1866, and his case now is that the land was an "ancient inclosure" at the date of the award in 1866, and that therefore it was not subject to the jurisdiction of the valuer and commissioners. The question upon this before the Divisional Court was whether they would enter judgment for the plaintiff or order a new trial. They rightly allowed the appeal, but ordered a new trial to ascertain whether the land had been inclosed, as described in s. 52 of the Inclosure Act, 1845, more than twenty years before the day of the first meeting for the examination of claims, and was therefore to be deemed and taken to be an ancient inclosure. They did that without deciding the question which has been raised before us. The question is whether upon the true construction of the Act of 1845 that was a question for the valuer and commissioners to decide and not for the Court.

The scheme of the Act is this. Sect. 16 points out who are the persons interested in lands subject to be inclosed, and among them are persons in actual possession or enjoyment of any such land. By s. 33 the commissioners are to call a meeting of the persons interested in the land to be inclosed for the purpose of appointing a valuer to divide, set out, and allot such land among the persons interested therein, and if those persons cannot agree upon a valuer the commissioners shall appoint one. By s. 46 and the following sections the valuer so appointed is to hold meetings for the examination of claims, and all persons claiming any common or other right or

interest in any land proposed to be inclosed shall deliver their claims in writing, stating the particulars thereof; the valuer is to give public notice of such claims, and notice of objection may be given to any such claims, and the valuer is to examine into and determine the claims, and may allow the same in whole or in part as to him shall appear just, and any person dissatisfied therewith may appeal to the commissioners; and by s. 56 any person who is dissatisfied with the determination of the commissioners may bring an action upon a feigned issue at the assizes to test the decision of the commissioners. There are certain matters expressly excepted by s. 49 from the valuer's or commissioners' jurisdiction. "Nothing in this Act contained shall extend to enable the valuer, or the commissioners, or any assistant commissioner to determine the title of any lands, or to determine any right between any parties contrary to the actual possession of any such party (except in cases of encroachment as hereinafter mentioned)," that is to say, encroachments and inclosures within the twenty years. Buckley L.J. is of opinion that the words "the title of any lands" mean the title of any lands in respect of which a claim is made to have an allotment of land under the award. I am myself not quite satisfied whether that is so. I am not quite sure that in *Ivatt* v. *Mann* (1) Shadwell V.-C. did not take a different view. But however that may be, the exclusion extends to the determination of the title of any lands except in cases of encroachment as thereinafter mentioned, The encroachment thereinafter mentioned is therefore left within the jurisdiction of the valuer and the commissioners. These encroachments are by s. 50 specified to be all encroachments and inclosures, with certain exceptions, from or upon any part of the land proposed to be inclosed within twenty years next before the first meeting for the examination of claims in the matter of the inclosure. Then s. 52 specifies what are to be deemed to be ancient inclosures. [The Lord Justice read the section.] The section does not state what is to happen as to ancient inclosures, but the whole scheme of the Act shows that ancient inclosures are not subject to the Act at all and are not to be dealt with under the award. I do not think

(1) 4 Scott, N. R. 342, at pp. 361—365.

C. A. 1915

BLACKETT v. RIDOUT.

Bankes J.

that any distinction can be drawn between an encroachment and an inclosure. An encroachment may take place by means of an inclosure. In my opinion the decision of the question whether an encroachment by way of inclosure has or has not existed for twenty years before the date of the first meeting for the examination of claims is one of the matters left to be decided by the valuer. This view is strengthened by other sections of the Act, as, for instance, by s. 81. If that is so, s. 105 makes the award when confirmed by the commissioners conclusive, "and every allotment, exchange, partition, direction, matter, and thing specified and set forth in such award as aforesaid shall be binding and conclusive on all persons whomsoever."

It is said that there are decisions which show that, though s. 105 has so enacted, the award is not conclusive. In *Chilcote* v. *Youldon* (1) there was no award, and the case only decided that the provisional order could be challenged. In *Jacomb* v. *Turner* (2) Collins J. held that s. 105 must be read with s. 49, and that "conclusive" in s. 105 meant conclusive as to all matters except title, which the valuer and commissioners had no jurisdiction to determine. The present is not a question of title within that exception, and therefore the valuer and commissioners had jurisdiction to determine it.

Appeal dismissed and cross-appeal allowed.

Solicitors for plaintiff: *Robinson & Bradley, for E. S. Clark, Wareham.*

Solicitors for defendant: *Peacock & Goddard, for Trevanion, Curtis & Ridley, Poole.*

(1) 3 E. & E. 7.

(2) [1892] 1 Q. B. 47.

W. F. B.

[COURT OF CRIMINAL APPEAL.]

1915
March 29.

THE KING *v.* HOPPER.

Criminal Law—Murder—Manslaughter—Question of Provocation not left to Jury—Duty of Judge to direct Jury on Question arising out of Evidence, although not relied upon by Counsel.

Whatever may be the line of defence adopted by counsel for a prisoner at the trial, the judge is bound to put to the jury such questions as appear to him properly to arise upon the evidence even although counsel may not himself have raised some point.

At the trial of the appellant for murder his counsel relied substantially on the defence that the killing was accidental, but he indicated that in the event of the jury not accepting that view he would ask them to find that the crime was manslaughter and not murder. The judge, taking the view that there was no evidence of such provocation as would reduce the crime to manslaughter, directed the jury that it was impossible for them to find a verdict of manslaughter, and that if they did not come to the conclusion that the killing was accidental they must find a verdict of murder. The jury returned a verdict of murder. On appeal:—

Held, that there was evidence of such provocation as would, if the jury accepted it, justify them in finding a verdict of manslaughter, that the judge ought to have left to the jury the question whether the crime was manslaughter only, and that as he had omitted to do so, the Court, acting under s. 5, sub-s. 2, of the Criminal Appeal Act, 1907, would enter a verdict of manslaughter which the jury might have found if they had been directed upon the point.

APPEAL from a conviction at Cardiff Assizes for murder.

On December 25, 1914, the appellant, a sergeant in the 6th Welsh (Territorial) Regiment, was in charge of twelve men who were on guard at Swansea Docks. There had been during the day much drinking among them, and at 8 P.M. the appellant was very drunk. Later the same evening the appellant missed a bottle of whisky, and he accused Private Dudley of the same regiment of having stolen it. Dudley called him a liar, and a fight ensued, and Private Gates came to the assistance of Dudley, who threatened to use his bayonet. The two men, Dudley and Gates, then got the appellant down on the ground and "hammered" him very considerably. An officer then arrived and ordered the arrest and disarming of the two privates, and

1915

REX v. HOPPER.

the appellant, as a non-commissioned officer, had to take them in charge with an escort. On the way to the guard-room Dudley was ordered to, but refused to, give up his bayonet, and he put his hand on the hilt of it, as one of the escort said, in order to prevent it being taken away. The appellant again ordered Dudley to disarm, and again Dudley put his hand on the bayonet, and said something—according to one witness, "What if I refuse?" —according to the appellant, "I will stick it into you." The appellant ordered the escort to disarm Dudley, and during a struggle in the attempt to take away Dudley's bayonet the appellant levelled his rifle and fired and Dudley fell dead. The rifle was a Lee-Metford, with a light pull and no safety catch, and the bayonet was fixed. It was not disputed that it was proper for the appellant to be carrying a loaded rifle.

At the trial of the appellant for the murder of Dudley the defence mainly relied on was that the affair was an accident, but counsel for the appellant did not give up the alternative defence of manslaughter. The appellant in his evidence said that he was not angry at the time. In his summing-up Atkin J. told the jury that it was impossible for them upon the evidence to find a verdict of manslaughter, and he directed them that, if they did not come to the conclusion that the affair was an accident, they must find a verdict of murder. The jury returned a verdict of murder with a strong recommendation to mercy.

Llewelyn Williams, K.C., and *Trevor Hunter*, for the appellant. There was such provocation by the deceased man as reduced the crime to manslaughter; at all events the question is not for the judge but for the jury, and it ought to have been left to them. In *Reg.* v. *Welsh* (1) Keating J., in directing the jury in a trial for murder where it had been urged in defence that there had been such provocation as reduced the crime to manslaughter, said: "I can discover no proof of such provocation in the evidence. If you can discover it, you can give effect to it." Further, the jury should have been asked to consider whether the fact that the appellant had been drinking heavily might not have inflamed his mind so much that he would be easily provoked

(1) (1869) 11 Cox, C. C. 336.

to do what he did in view of the acts of grave insubordination by Dudley. Any defence which is open on the evidence must be left to the jury, and in this case, as the judge did not leave to the jury the question as to the crime being manslaughter only and not murder, the verdict cannot stand, and this Court can, under s. 5, sub-s. 2, of the Criminal Appeal Act, 1907, enter a verdict of manslaughter.

Ellis Griffith, K.C., and *Clive Lawrence*, for the Crown. The judge was right in directing the jury as he did, inasmuch as the defence really relied on for the appellant at the trial was accident. The governing principle as to the duty of a judge in directing a jury was thus stated by Lord Alverstone C.J. in *Rex* v. *Hampton* (1): "We have to repeat that a summing-up is not a dissertation upon the law, but must have reference to the way in which each case has been conducted at the trial." As to the suggested provocation, it is to be observed that the appellant said at the time that he was not angry, that is, that he was not in fact provoked. The verdict was therefore right.

Llewelyn Williams, K.C., replied.

[*Rex* v. *Horn* (2) and *Rex* v. *May* (3) were also referred to.]

The judgment of the COURT (Lord Reading C.J., Bray and Lush JJ.) was delivered by

LORD READING C.J. The appellant, a sergeant in the Reserve battalion of the Sixth Welsh Regiment, was tried and convicted of the murder of Private Dudley, who was in the same regiment as, and was at the time under the command of, the appellant. The verdict of the jury was accompanied by a strong recommendation to mercy.

The ground of appeal is that the judge in his direction to the jury told them that they must either find a verdict of murder or acquit the prisoner; in other words, he told them that if they did not accept the theory put forward by the defence that the killing of Dudley was accidental, there was no alternative open to them but to find a verdict of murder. On the hearing of the appeal before us, Mr. Llewelyn Williams has quite properly

(1) (1909) 2 Cr. App. R. 274, at p. 276. (2) (1912) 76 J. P. 270.
(3) [1912] 3 K. B. 572.

1915

REX v. HOPPER.

argued the case on the footing, as found by the jury, that the killing was not accidental. The question that is left is whether the judge ought to have left to the jury the option of finding upon the evidence which was before them a verdict of manslaughter.

[His Lordship then stated the facts and continued:] Although the defence mainly relied upon at the trial was that the killing was accidental, Mr. Llewelyn Williams indicated quite clearly before the judge came to sum up that although he was raising the defence of accident he was not giving up the defence of manslaughter, and that he intended to claim a verdict of manslaughter if he did not succeed in obtaining an acquittal on the point of accident. When the judge came to sum up he took the view upon the facts as presented that it was impossible for the jury to find a verdict of manslaughter, and, consequently, he directed them that they must either acquit the prisoner on the ground that the killing was accidental, or if they did not take that view, they must find him guilty of murder. After careful consideration of all the circumstances we have come to the conclusion that the question as to the crime being manslaughter only ought to have been left to the jury so as to enable them if they thought right to find a verdict of manslaughter. It was not in our opinion correct to say that there was no alternative but to find accident or murder. There was sufficient evidence to justify the jury, if they accepted a certain view of the facts and circumstances, to find a verdict of manslaughter. It is not for us to say whether they would have found such a verdict, but the question is whether it should have been left open to them to find it if they thought fit.

One must bear in mind that there was provocation by the fight which had taken place and the fact that the two men had held the appellant down and hammered him; there was the important fact, probably the most important fact, that immediately before the firing of the rifle by the appellant the deceased man had said he would stick, or had half a mind to stick, the appellant with his bayonet, and this time put his hand on his bayonet; there is the further fact to be taken into account that all this was grave insubordination by Dudley to his superior officer, and

the circumstance that it occurred in the presence of the other men no doubt aggravated all the conditions to which I have called attention. Further, it has also to be borne in mind, although upon this not much reliance can be placed, that there had been much drinking, and the fact that there had been a fight all tended to make the appellant lose control of himself at the critical moment when he fired the rifle. In those circumstances the question ought to have been left to the jury, upon a proper direction, to say, if they were so minded, that the crime was manslaughter and not murder.

We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand.

We desire to add further that we do not accept the argument addressed to us by counsel for the Crown, and relied upon by the judge in his summing-up, that because the appellant said that he was not angry at the time, that must be taken against him as negativing the proposition that the crime could be manslaughter. In saying that he was not angry the appellant was trying to shelter himself behind the plea of accident, and it was open to the jury to say that the statement he made was not true. Other views of the facts than those given by him in his evidence cannot be excluded. In a Court of justice it is for the Court, with the assistance of the jury, to arrive at the true view of the facts without paying too much attention to whether a particular witness is called by one side or the other.

Having arrived at the conclusion that the question whether

1915

REX v. HOPPER.

the crime was manslaughter and not murder should have been left to the jury, this Court has power under s. 5, sub-s. 2, of the Criminal Appeal Act, 1907, to substitute for the verdict found the verdict which might have been found if the jury had been properly directed. We cannot possibly say that a verdict of manslaughter would have been found by the jury, but as the question should have been left to them the appellant is entitled to the benefit of a verdict for the lesser offence. We direct accordingly that the verdict of murder be quashed and a verdict of manslaughter entered.

[The Court then sentenced the appellant to four years' penal servitude.]

Sentence reduced.

Solicitors for appellant: *Andrew & Thompson, Swansea.*
Solicitor for the Crown: *Director of Public Prosecutions.*

J. S. H.

C. A.

1915

Jan. 12, 13.

[IN THE COURT OF APPEAL.]

WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* LINTHWAITE URBAN DISTRICT COUNCIL.

Local Government—Public Health—River—Pollution—Polluting Liquid—Sewer vested in Local Sanitary Authority—Proceedings against Sanitary Authority—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict.* c. 75), *ss.* 4, 6, 8.

Proceedings may be taken against a local sanitary authority under s. 4 of the Rivers Pollution Prevention Act, 1876, for causing or permitting polluting liquid proceeding from a factory or manufacturing process to fall or flow or be carried into a stream.

Decision of Divisional Court [1914] 2 K. B. 13 reversed.

APPEAL of the plaintiffs from a decision of a Divisional Court (Ridley and Bankes JJ.), reported [1914] 2 K. B. 13.

The plaintiffs brought these proceedings in the Huddersfield County Court against the defendants under s. 4 of the Rivers

Pollution Prevention Act, 1876 (1), complaining that the defendants caused and continued to cause to fall or flow and knowingly

(1) By 39 & 40 Vict. c. 75, s. 4: "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. . . . ."

By s. 6: "Unless and until Parliament otherwise provides the following enactments shall take effect, proceedings shall not be taken against any person under this part of this Act save by a sanitary authority, nor shall any such proceedings be taken without the consent of the Local Government Board: Provided always, that if the sanitary authority, on the application of any person interested alleging an offence to have been committed, shall refuse to take proceedings or apply for the consent by this section provided, the person so interested may apply to the Local Government Board, and if that Board on inquiry is of opinion that the sanitary authority should take proceedings, they may direct the sanitary authority accordingly, who shall thereupon commence proceedings.

"The said Board in giving or withholding their consent shall have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality.

"The said Board shall not give their consent to proceedings by the sanitary authority of any district, which is the seat of any manufacturing industry, unless they are satisfied, after due inquiry, that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures are reasonably practicable and available under all the circumstances of the case, and that no material injury will be inflicted by such proceedings on the interests of such industry.

"Any person within such district as aforesaid, against whom proceedings are proposed to be taken under this part of this Act, shall, notwithstanding any consent of the Local Government Board, be at liberty to object before the sanitary authority to any such proceedings being taken, and such authority shall, if required in writing by such person, afford him an opportunity of being heard against such proceedings being taken, so far as the same relate to his works or manufacturing processes. The sanitary authority shall thereupon allow such person to be heard by himself, agents, and witnesses, and after inquiry such authority shall determine, having regard to all the considerations to which the Local Government Board are by this section directed to have regard, whether such proceedings as aforesaid shall or shall not be taken; and where any such sanitary authority has taken proceedings under this Act, it shall not be competent to other sanitary authorities to take proceedings under this Act" till the party against whom such proceedings are intended shall have failed in reasonable time to carry out the order of any competent Court under this Act."

By s. 8: "Every sanitary authority shall, subject to the restrictions in

C. A.
1915

WEST RIDING OF YORKSHIRE RIVERS BOARD v. LINTHWAITE URBAN COUNCIL.

permitted and still permitted to fall or flow or to be carried into the river Colne, within the jurisdiction of the plaintiffs, polluting liquid proceeding from certain specified factories situate within the district of the defendants and from the manufacturing processes carried on in those factories; and the plaintiffs claimed a summary order requiring the defendants to abstain from the commission of those offences.

The plaintiffs under a Provisional Order confirmed by statute (56 & 57 Vict. c. cxxxii., clause 12), had all the powers and duties of a sanitary authority under the Rivers Pollution Prevention Act, 1876. The defendants were the urban sanitary authority of the district in which the alleged pollution of the river was caused. The plaintiffs alleged that the polluting liquid was carried into the river through a sewer vested in the defendants under s. 13 of the Public Health Act, 1875.

The county court judge made an order against the defendants, who appealed.

The Divisional Court (Ridley and Bankes JJ.) held that proceedings could not be taken against a local sanitary authority under s. 4 of the Rivers Pollution Prevention Act, 1876, for causing or permitting polluting liquid proceeding from a factory or manufacturing process to fall or flow or be carried into a stream.

The plaintiffs appealed.

Scott Fox, K.C., and *Lowenthal*, for the plaintiffs. The wide general words of s. 4 will clearly include a sanitary authority,

---

this Act contained, have power to enforce the provisions of this Act in relation to any stream being within or passing through or by any part of their district, and for that purpose to institute proceedings in respect of any offence against this Act which causes interference with the due flow within their district of any such stream, or the pollution within their district of any such stream, against any other sanitary authority or person, whether such offence is committed within or without the district of the first-named sanitary authority.

"Any expenses incurred by a sanitary authority in the execution of this Act shall be payable as if they were expenses properly incurred by that authority in the execution of the Public Health Act, 1875.

"Proceedings may also, subject to the restrictions in this Act contained, be instituted in respect of any offence against this Act by any person aggrieved by the commission of such offence."

and the effect of the operative words of that section ought not to be cut down by reason of the special provisions of s. 6 relating to proposed proceedings by a sanitary authority against manufacturers. But the question is concluded by the provisions of s. 8, which was not relied upon in the Divisional Court; that section is in perfectly general terms and when it is found that the enforcing authority is named in that section and also the possible defendants, it would be mutilating the Act to hold that the conditions imposed by s. 6 get over the plain meaning of the Act. In *Butterworth* v. *West Riding of Yorkshire Rivers Board* (1) it was never suggested that a local authority could not be proceeded against.

Waugh, K.C. (*R. A. Shepherd* with him), for the defendants. The whole of Part 3 of the Act, which includes ss. 4 and 6, clearly contemplates proceedings against mine owners or manufacturers only, and the provisions of s. 6 show that proceedings are to be taken by a sanitary authority only, and not without the consent of the Local Government Board. The provisions of s. 6 are quite inconsistent with any proceedings being taken against a sanitary authority. Sect. 8 was not advisedly drawn. [He also cited *Kirkheaton Local Board* v. *Ainley*. (2)]

BUCKLEY L.J. The plaintiffs in this action are the West Riding of Yorkshire Rivers Board, who, under a Provisional Order of May 17, 1893, and an Act of 1894, called the West Riding of Yorkshire Rivers Act, 1894, are a body having all the powers and duties of a sanitary authority under the Rivers Pollution Prevention Act, 1876, and all the provisions of that Act are to apply to the plaintiffs, with the necessary modifications.

The plaintiffs brought this action against the Linthwaite Urban District Council in the county court to obtain relief in respect of the pollution of the river Colne alleged to have been caused by acts for which the defendants are responsible. The learned county court judge heard the case, and upon the facts, as to which we have, for a reason which will appear presently, heard nothing at all, he gave judgment for the plaintiffs. The defendants

(1) [1909] A. C. 45. (2) [1892] 2 B. 274.

C. A. 1915

WEST RIDING OF YORKSHIRE RIVERS BOARD v. LINTHWAITE URBAN COUNCIL.

Buckley L.J.

appealed, and in the Divisional Court the defendants raised this contention, which had not been raised in the county court, that they could not be sued at all; that they were defendants who could not be proceeded against by the plaintiffs. I do not feel myself embarrassed by the fact that that matter had not been raised before the county court judge. For one thing the parties agreed that it was properly entertained by the Divisional Court. At any rate the Divisional Court did entertain it, and they heard it and affirmed the proposition that the defendants were persons who could not be sued. If that be wrong, obviously this Court can review it, because the result would be that the county court judge has given judgment in an action in which the defendants could not be sued, and therefore, of course, the judgment would come to nothing. The plaintiffs say that that is wrong, that they could be sued, and therefore the matter was, I think, properly open before the Divisional Court. At any rate, whether it was or not, it is properly open before us, and if that decision of the Divisional Court is wrong it lies upon us to set it right.

I think the whole case we have to consider is this, knowing nothing of the merits or the demerits of the dispute: Are the appellants right as a matter of law in saying, under the provisions of the Rivers Pollution Prevention Act, 1876, we, the plaintiffs (as such a sanitary authority as I have mentioned), are entitled to sue you, another sanitary authority, in respect of the matter which is in dispute in the action?

For that purpose I am not going to refer to certain sections of the West Riding of Yorkshire Rivers Act, 1894, which have been commented upon, and which reproduce with certain alterations some of the provisions in the Rivers Pollution Prevention Act, 1876, to which I am going to refer, and that for this reason, that s. 17 of the Act of 1894 provides that "All the powers and provisions of this Act of 1894 are in addition to and not in derogation of any other powers possessed by the Rivers Board under the provisions of the Local Government Board's Provisional Orders Confirmation (No. 16) Act, 1893, and the Rivers Board may exercise all or any of such other powers as if this Act had not been passed." My whole duty lies in this, that I have to read the Act of 1876 and say, under that Act of Parliament can these

plaintiffs sue these defendants? Now, the Act of 1876 is one which deals with different subject-matters in Parts 1, 2, and 3, and it then goes on in Part 4 to deal with what is called in the heading "Administration of Law," and it contains in s. 8 a section which is very material to the matter which we have to consider. It is strange, but it is the fact, that s. 8, on which in my view the whole contest really turns, was mentioned it is true before the Divisional Court, but no argument was raised upon it. I do not think the attention of the Divisional Court was really called to the real subject-matter which gives rise to the decision which we have to pronounce upon in this case.

Now, the three or four parts I have mentioned are these. The purpose of the Act is "To make further provision for the prevention of the pollution of rivers," and Part 1 is headed "Law as to Solid Matters." Part 2 is headed "Law as to Sewage Pollutions," and Part 3 is headed "Law as to Manufacturing and Mining Pollutions," and it is with Part 3 that we have to do. Each of those parts commences with words which are identical, with a difference which I will mention shortly. Part 1 begins thus: "Every person who puts or causes to be put or to fall or knowingly permits to be put or to fall or to be carried into any stream," and then it goes on to mention solid matters. Part 2 begins as follows: "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter." The words are identically the same, with the alteration of the verb, inasmuch as Part 1, dealing with solid matters, does not of course use the verb "flow," whereas Part 2, relating to solid and liquid matters, uses both the word "flow" and the word "fall," which has been used in Part 1. In other words, there is a distinction without a difference. The language addressed to the subject-matter is the same. Part 3 begins with these words: "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream"—identically the same words to those with which Part 2 begins. That refers to trade or manufacturing. The Act of Parliament contains a definition, if it be necessary to refer to it at all, which defines "person" to include any body of persons, whether corporate or unincorporate, so that

C. A. 1915

WEST RIDING OF YORKSHIRE RIVERS BOARD v. LINTHWAITE URBAN COUNCIL.

Buckley L.J.

so far I find that these three divisions of the Act of Parliament render it an offence on the part of a person, which is to include a body corporate or unincorporate, to do certain things set out in the three parts. There is no question at all, and it could not be disputed, and it is not disputed, that under Parts 1 and 2 a sanitary authority can be proceeded against, and that a sanitary authority is a proper defendant. I might mention, simply to pass it by, that under s. 3, which is in Part 2, it is perfectly obvious, because the section itself contains a provision for giving further time to a sanitary authority, if it is sued, of course, and also contains in the last clause a provision that a person other than a sanitary authority shall not be guilty of an offence, and therefore, of course, the sanitary authority could be guilty of an offence, so that under Parts 1 and 2, that is, under ss. 2 and 3, there is no question but that the sanitary authority can be a defendant. It is said that notwithstanding that, it cannot be a defendant under Part 3, that is to say under s. 4, which is this case, and it is said that that is so because, although the language which creates the offence is as I have shown identical with the language which creates the offences in the other cases, there are contained in s. 6 certain restrictive provisions in favour of the person who is sued, and it is said that from those restrictive provisions there is to be inferred this: that the defendant who is sued under s. 4 must be a person to whom those restrictive provisions apply.

I have to examine whether that argument is well-founded or not. This Part 3, that is to say s. 4, is dealing with a case in which the prevention of the pollution would affect the trade, that is where it proceeded from any factory or manufacturing process, and s. 6, under those circumstances, contains provisions for the protection of the trader. Reading the Act of Parliament, it is obvious that the intention was not to prevent pollution at the expense of exposing persons who are engaged in trading operations to an interference with their trade, except under particular circumstances. Traders were to be protected, and accordingly s. 6 contains provisions to this effect, that under this part of the Act, that is to say, the trading part of the Act, in the first place the only person who can sue is the sanitary

authority. Another person cannot sue. The sanitary authority is the only person who can sue, and even the sanitary authority cannot sue unless the proceedings are approved by the Local Government Board. Here is the first provision, namely, that the plaintiff must be the sanitary authority, and the Local Government Board must consent to the proceedings. That is qualified by this, that a person not being the sanitary authority, who says the sanitary authority is not sufficiently active, may apply to the Local Government Board to apply a spur to the sanitary authority, and if that is done, and the Board on inquiry is of opinion that the sanitary authority should take proceedings, they may direct proceedings accordingly. That is the first clause of s. 6. The second clause is this: That the Local Government Board, in considering whether they will give their consent or not, are to have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality. Those are words under which certainly it would be competent to the Local Government Board to say that, having regard to the conditions of trade and the industrial interests involved in the case, proceedings ought not to be taken; that there should be pollution, rather than an interference with trade. At any rate, the Local Government Board have to consider that. Then there follow two clauses, on which the contest arises, and they are these: The first is one which controls the Local Government Board: "The said Board shall not give their consent"—To what? "To proceedings by the sanitary authority of any district which is the seat of any manufacturing industry, unless they are satisfied, after due inquiry, that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures are reasonably practicable and available under all the circumstances of the case, and that no material injury will be inflicted by such proceedings on the interests of such industry." There is the detail of the matters to which the Local Government Board are to have regard in determining whether proceedings should be taken or not, where those proceedings are proceedings by the sanitary authority of any district which is the seat of any manufacturing industry. The next clause is this. It is a clause which provides

C. A. 1915

WEST RIDING OF YORKSHIRE RIVERS BOARD v. LINTHWAITE URBAN COUNCIL.

Buckley L.J.

that the proposed defendant in the action shall have certain remedies : "Any person within such district as aforesaid, against whom proceedings are proposed to be taken under this part of this Act, shall, notwithstanding any consent of the Local Government Board, be at liberty to object before the sanitary authority to such proceedings being taken, and such authority shall, if required in writing by such person, afford him an opportunity of being heard against such proceedings being taken, so far as the same relate to his works or manufacturing processes." There I pause, to contrast those words "his works" with the words at the beginning of s. 4, "proceeding from any factory or manufacturing process." This clause which I am upon now is one which presupposes that the Local Government Board have given their consent. So far the proceedings are to go on, but the trader in the affected area is still to be entitled to this : He may go to the sanitary authority, that is to say, the prosecuting sanitary authority, and persuade them if he can that the proceedings ought not to go on. Then the clause goes on to say that they are to hear him, and after inquiry, having regard to all the considerations which the Local Government Board ought to regard, they are to go on and determine whether such proceedings shall or shall not be taken. It is possible that that last clause applies to the case in which the prosecutor in the matter is not the sanitary authority of the district which is the seat of the manufacturing industry, which is clearly the case in the previous paragraph, but where the person is situate within a manufacturing district, and it is possible therefore that that last clause might apply in a larger class of cases than that to which the previous clause applies, but I do not think it is necessary to consider that more particularly.

Now let me pause there for a moment and see what has been said so far. Trading in the district; manufacturing industry in the district; traders are to be protected. In what cases are they to be protected? In cases where the proceedings are by the sanitary authority of the district which is the seat of the manufacturing industry. The argument which we have heard really amounts to this : that that language is to be altered and means the consent to proceedings by any sanitary authority with respect

to a district which is the seat of a manufacturing industry. My answer is that that is not the language of the Act of Parliament. The clause is confined to the case where the prosecuting sanitary authority is the sanitary authority of the district which is the seat of the manufacturing industry.

Now, reading on, I come to s. 8, which is the section which to my mind determines the matter. It is a section which contemplates that the pollution in question may affect a district other than the district in which the pollution is originally caused. It includes, for instance, the case in which the sanitary authority of, perhaps, a purely rural district situate, say, five miles down the river, is affected by the pollution of a river five miles away, and it is the section which provides that the sanitary authority of such a district as that may take proceedings against the sanitary authority of the district in which the pollution occurs, and the question is whether under those circumstances the clauses which I have referred to in s. 6 are applicable. Sect. 8 is this: "Every sanitary authority shall, subject to the restrictions in this Act contained, have power to enforce the provisions of this Act in relation to any stream being within or passing through or by any part of their district, and for that purpose to institute proceedings in respect of any offence against this Act which causes interference with the due flow within their district of any such stream, or the pollution within their district of any such stream, against any other sanitary authority or person, whether such offence is committed within or without the district of the first-named sanitary authority."

This is a case in which the plaintiff sanitary authority—the West Riding Rivers Board—are taking proceedings against another sanitary authority, namely, the Linthwaite Sanitary Authority, for an offence against this Act, namely, the offence such as is mentioned in s. 4 of this Act, which causes pollution within the district of the West Riding Rivers Board of the stream into which the effluent is poured. That is a perfectly plain section. It is a section which enables the plaintiff sanitary authority to sue the defendant sanitary authority, but it is said that the plain language of that section is to be controlled by an inference to be drawn from s. 6. It is said that s. 4 must be so

C. A. 1915

WEST RIDING OF YORKSHIRE RIVERS BOARD v. LINTHWAITE URBAN COUNCIL.

Buckley L.J.

read as to exclude s. 8 from cases under s. 4, because there are restrictions imposed by s. 6. To my mind there is no such inference to be drawn from the Act of Parliament. The provisions by way of restriction contained in s. 6 are provisions which are operative in certain cases, those cases in which the sanitary authority of the district which is the seat of a manufacturing industry is taking proceedings. It may be—I do not say it would not have been—a better wording and amplification of the Act of Parliament to have extended that provision to the other case under s. 8 so that the language would have been: Proceedings by any sanitary authority with reference to a district which is the seat of a manufacturing industry; but that is not the language of the Act of Parliament, and that restriction is not addressed to the case which arises here.

Now why, because there is a restriction which is operative in one case under s. 8, have I to say that therefore there is no other case under s. 8, when s. 8 plainly renders that other case a case in which proceedings may be taken? It is said, and Mr. Waugh has argued it strongly, that unless you take that view the trader in the manufacturing district in question is subjected to a hardship because he cannot defend himself in the matters which are offered for his defence by these clauses 3 and 4 of s. 6. Even if that were so it would not affect my opinion, but to my mind it is not so, because under the second clause of s. 6 it would be perfectly competent for the Local Government Board to take into account, and I suggest they ought to take into account, the industrial interests involved in the case, which industrial interests, after all, are pointed out and amplified by the subsequent clause of that section. It is not the fact that the trader is exposed to any hardship by reason of the fact that the subsequent clauses of s. 6 do not extend to this case. He would be protected on the proceedings before the Local Government Board. Reading the Act of Parliament, it seems to me quite plain that s. 8 of this Act of Parliament authorizes an action to be brought by this sanitary authority—the Rivers Board—against the sanitary authority of the Linthwaite Urban District Council, and that being so it results that there is a proper defendant in this action, and that the action must proceed.

That is the whole matter which we have to deal with. As to the merits of the case; if there is a case of pollution, or how it ought to be dealt with, we do not know at all. Our only duty I apprehend is this: To allow this appeal, deciding it that the defendants are persons who can be sued, and to remit it for further hearing before the Divisional Court.

KENNEDY L.J. In this case the learned county court judge came to a conclusion on the facts of the case, and he was a proper tribunal to deal with the facts and law in the first instance. The matter then goes to the Divisional Court and a point was raised upon which the Divisional Court has decided that the action is not maintainable. It was a point which was not taken in the Court of first instance. I altogether decline to enter into the question as to whether or not if that fact had been insisted upon it would have been an answer in the Divisional Court that the county court judge never had the matter raised before him. This is a peculiar and special procedure, and it may be that that would have been a good point. Whether or not, in fact, both parties discussed and argued this one matter before the Divisional Court, it is so reported. It is evident that the argument was very fully developed before them, and we have the judgments of the two members of that Court in favour of the respondents on this appeal to this Court. I express no opinion as to whether or not it would have been right, had that objection to this question been raised in the Divisional Court, for the Divisional Court to have said: This is a point which it is not open to the appellants to raise. I am of opinion that the decision of the Divisional Court upon the point as raised was, with all respect to them, not the right decision, and I can state it, at any rate so far as it appears to me to be material, really without any length at all. I go straight to s. 8. Sect. 8 of this Rivers Pollution Prevention Act, 1876, is the section which by its heading is concerned to enact what the powers of a sanitary authority are to enforce the Act, and the enforcement of the Act is the matter of this section. It seems to me I want to see what power was given to a sanitary authority—the plaintiffs in this case being the sanitary authority—and I look to that section to see what the powers

C. A. 1915

WEST RIDING OF YORKSHIRE RIVERS BOARD v. LINTHWAITE URBAN COUNCIL.

Kennedy L.J.

are, and it says that "Every sanitary authority" (which therefore includes the plaintiffs) "shall, subject to the restrictions in this Act contained, have power to enforce the provisions of this Act in relation to any stream being within or passing through or by any part of their district, and for that purpose to institute proceedings in respect of any offence against this Act which causes interference with the due flow within their district of any such stream, or the pollution within their district of any such stream, against any other sanitary authority or person whether such offence is committed within or without the district of the first-named sanitary authority." Prima facie, therefore, the plaintiffs have a right, I take it, if they can prove their case that there has been an offence of pollution, to enforce the provisions of this Act. One of those provisions is s. 4, and it is under that section that the plaintiffs are seeking to sue, as they are prima facie entitled to sue, the other sanitary authority, who are the defendants. But I have still one more matter to see, namely, is there a restriction in this Act contained which ought to be held to bar the plaintiffs' right to sue? The only alleged restriction is to be found in s. 6, so it seems to me that the logical thing is to look at s. 6 to see whether it does bar them. It is headed on the face of it as a restriction clause: "Restriction on proceedings under this part of the Act," and this part of the Act includes s. 4. I quite agree that in one's humble judgment now, having seen the practical difficulties that may arise, it would have been easier to come to the conclusion to which I have come if the words had been somewhat different, in the sense of being somewhat more precise, and if the clauses had been, to my mind, instead of all being brought together, divided into two sub-sections. The meaning nevertheless of s. 6, fairly read, is clear enough, that is, it imposes a restriction in the case of a sanitary authority taking proceedings against an alleged committal of an offence within their district. It was therefore properly put in s. 8: "Every sanitary authority . . . . subject to the restrictions in this Act contained." The restriction is one which appears to me to be in the main a restriction upon proceedings being taken against a person in the district of the sanitary authority. That is the main purpose. "Unless and

until Parliament otherwise provides . . . . proceedings shall not be taken against any person under this part of the Act" first of all, "save by a sanitary authority, nor shall any such proceedings be taken without the consent of the Local Government Board."

These proceedings are taken by a sanitary authority, and I presume that the consent of the Local Government Board was obtained—at any rate we have no statement to the contrary—with a provision which prevents undue sluggishness on the part of the sanitary authority to take the proceedings. In the case which might very well happen—at any rate a case which ought to be guarded against in legislation—of a sanitary authority which is elected, at any rate I suppose in part, from the district, it ought to be guarded against being controlled, particularly if it is an important industrial district, by those who have large interests in the commerce of the place. Then the section continues: "Provided always that if the sanitary authority, on the application of any person interested alleging an offence to have been committed, shall refuse to take proceedings," the Local Government Board may, in the interests of the general population, interfere, and direct that the sanitary authority should take those proceedings. That is obviously a provision which relates to a district which has its sanitary authority, and in the area of which the alleged pollution is said by the complainant to take place. But then follow words which I referred to and which I said I thought might well have been separated and put as a separate section: "The said Board in giving or withholding their consent shall have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality." It is unnecessary to say whether or not that might be applicable even to such a case as the present, in which the plaintiff sanitary authority is a sanitary authority outside the industrial area which is the area or district referred to. It may be that the Board in giving or withholding their consent to the present action shall have regard to the industrial interests involved in the case and extend their view to that matter although the plaintiff is not the sanitary authority in the district itself. But be that as it may, the clause and all that follows

C. A.
1915

WEST RIDING OF YORKSHIRE RIVERS BOARD v. LINTHWAITE URBAN COUNCIL.

Kennedy L.J.

have sufficient weight given to them as a restriction on proceedings where the proceedings are by a sanitary authority which is the sanitary authority of the district in which it is alleged that the offence under s. 4 had been committed. I think that there is some degree of clearness imparted to that restriction being one confined to the particular case of a body proceeding against somebody who is alleged under s. 4 to have committed the offence therein mentioned, because at the very close of the whole section it will be seen that there is a provision that where any such sanitary authority—that means the authority of the district—has taken proceedings under this Act it shall not be competent to other sanitary authorities (which would include, of course, the present plaintiffs) to take proceedings under this Act till the party against whom such proceedings are intended shall have failed in reasonable time to carry out the order of any competent Court under this Act. In other words, it guards against the proceedings of outside sanitary authorities against the alleged wrong-doer in this industrial district if his own sanitary authority has taken the proceedings which are referred to throughout the earlier part of the whole preceding part of this section, unless or until the body which has been proceeded against fails to carry out the order of the competent Court which has been made against him. That seems to me incidentally rather to show that what they were there dealing with, and intended alone to deal with, were the proceedings between the sanitary authority and some person or persons alleged to be wrong-doers under the Act within the district, and that it has no restrictive effect under s. 8, because it has no application in the case of one sanitary authority which is suing another.

All sorts of difficulties have been very clearly and ably put before us by Mr. Waugh as to some difficulties that may arise in some form or other. We have not got to consider whether Parliament might have, in its wisdom, provided for difficulties which may or may not arise. For myself, I confess I am not satisfied that those difficulties do arise. Here is a body, a sanitary authority, whose waters have been polluted, as they say, by what they say—and that is an issue of fact—has been a permit to flow by the sanitary authority of the district which

sends sewerage, and not only sewerage, but manufacturing or factory contents of a poisonous nature into the river. They may have an answer upon the facts as to whether they do or do not permit the flow, but there again I find they have their remedy against the manufacturer; but s. 8 expressly does say that one sanitary authority is empowered to sue another, subject to the restrictions of this Act, and it appears to me that the restrictions of this Act do not affect that action except in so far as the section provides that the consent of the Local Government Board may be obtained, and that the Local Government Board in giving the consent has a right to consider the whole circumstances of the locality as to whether it will give that consent or withhold it. That does not bar the present plaintiffs here, who have got that consent, and I assume that the Local Government Board, who gave it, have done their duty in considering all the facts. It seems to me that my brethren in the Court below, I must say, I do not think had this s. 8 very plainly put for their consideration. They do not refer to it, I think, in the course of their judgment, and the result was, to quote from the judgment of Bankes J., who says: "In the view which I take of the language of s. 6, it is to my mind plain that the persons against whom the proceedings are to be taken are limited to persons who are sending forth, or creating at their works or by their manufacturing processes, some of those liquids which are dealt with in s. 4." He could not have come to that conclusion if he had seen s. 8 expressly includes among the persons who can be sued another sanitary authority.

PICKFORD L.J. I am of the same opinion. There are three parts of this Act of Parliament which deal with the matter. The first is Part 1, s. 2, which is the "Law as to Solid Matters." The second is Part 2, s. 3, "Law as to Sewage Pollutions"; and the third one, with which we have to deal, is the "Law as to Manufacturing and Mining Pollutions," which is ss. 4 and 5, s. 4 being the one with which we have to deal.

It must be taken for the purposes of the only point before us that the defendants have committed acts which would

C. A. 1915

WEST RIDING OF YORKSHIRE RIVERS BOARD v. LINTHWAITE URBAN COUNCIL.

Pickford L.J.

constitute an offence if done by an individual, but the point before us is whether under those circumstances they can be sued under s. 4 as they could have been if they had committed similar acts within ss. 2 and 8. It is not denied that they could be sued, but it is said that they cannot be sued for matters contained in s. 4, and also in s. 5, because of s. 6. Sect. 6 is a section of restriction. The first restriction is that nobody shall take proceedings except a sanitary authority; and the second one is that the sanitary authority must have the consent of the Local Government Board. Then there is a provision that the Board in giving or withholding their consent should have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality. Then there follow two other provisions, the third and the fourth, which apply only in the case where the prosecution is to be instituted by the sanitary authority of any district which is the seat of any manufacturing industry. I will accept for the purposes of this case the argument that those two parts of the section do not apply to a prosecution by anybody except the sanitary authority of the district against a person within their district, but when it is sought to draw from that a conclusion that therefore no other sanitary body can sue, that conclusion to my mind is erroneous, because when you turn to s. 8 you find that, subject to the restrictions of the Act, and there are restrictions as to getting the consent of the Local Government Board, every sanitary authority which finds pollution in a stream in its district may take proceedings against any other sanitary authority or person, whether such offence is committed within or without the district of the first-named sanitary authority.

It seems to me that those clear and distinct words cannot possibly be overridden by an inference that may be drawn, or which is sought to be drawn, from the third and fourth clauses of s. 6. Where such a prosecution is instituted it may very well be, and very likely is, the fact that those two clauses do not apply. It seems to me that under the second clause requiring the Local Government Board to have regard to the industrial interests involved in the case they would before giving their consent very likely have to attend to all

the circumstances which are more particularly mentioned in the third and fourth clauses; but the fact, if it be a fact, that the third and fourth clauses only apply to a prosecution or proceedings by the sanitary authority of the district against a person who commits an offence seems to me no ground at all for cutting down the distinct and positive powers given by s. 8 of the Act. I think, therefore, that the decision was wrong and this appeal ought to be allowed.

I may say I am not at all satisfied that it was competent at all for the respondents here to raise in the Divisional Court the point which has now been argued, or that it was competent for the Divisional Court to deal with it, but it is not necessary to say more than that. I am not satisfied upon the matter because the point was never raised in the county court, and I am not satisfied that the principle that a point not taken in the county court cannot be raised in the Divisional Court does not apply in this case.

The appeal must be allowed and the order of the Divisional Court discharged.

Appeal allowed.

Solicitors for plaintiffs: *Clements, Williams & Co., for H. F. Atter, Wakefield.*

Solicitors for defendants: *Edgar Bogue, for Owen & Bailey, Huddersfield.*

W. J. B.

C. A.
1915
March 12, 25.

[IN THE COURT OF APPEAL.]

DATE *v.* GAS COAL COLLIERIES, LIMITED.

[1914 D. 568.]

Coal Mine—Inspection—Inspector appointed by Workmen—Check Weigher—Eligibility—Coal Mines Act, 1911 (1 *& 2 Geo. 5, c. 50), s. 16—Coal Mines Regulation Act*, 1887 (50 *& 51 Vict. c. 58), s. 13.

By s. 13, sub-s. 1, of the Coal Mines Regulation Act, 1887, the persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may station a person (referred to in the Act as a "check weigher") at each place appointed for the weighing of mineral and for determining the deductions, in order that he may on their behalf take a correct account of the weight of the minerals or determine correctly the deductions; and by sub-s. 2 a check weigher shall not be authorized in any way to impede or interrupt the working of the mine, or to interfere with the management of the mine, but shall be authorized only to take the account or determine the deductions.

By s. 16, sub-s. 1, of the Coal Mines Act, 1911, the workmen employed in a mine may appoint two of their number or any two persons, not being mining engineers, who are or have been practical working miners with not less than five years' experience of underground work, to make periodical inspections of the mine:—

Held, affirming the judgment of Bailhache J. [1914] 3 K. B. 1175, that a person who holds the appointment of check weigher at a mine is not thereby disqualified from being appointed to make, and from making, inspections of the mine under s. 16 of the Act of 1911.

APPEAL of the defendants from the judgment of Bailhache J. in an action tried without a jury.

The plaintiff was a check weigher appointed in accordance with the provisions of s. 13 of the Coal Mines Regulation Act, 1887 (1),

(1) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 13:

"(1.) The persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as 'a check weigher') at each place appointed for the weighing of the mineral, and at each place appointed for determining the deductions, in order that he may on behalf of the persons by whom he is so stationed take a correct account of the weight of the mineral or determine correctly the deductions as the case may be."

"(3.) A check weigher shall not be authorised in any way to impede or interrupt the working of the mine,

C. A.
1915

DATE
v.
GAS COAL COLLIERIES, LIMITED.

by the workmen employed at the Meiros Colliery, of which the defendants were the owners. On October 29, 1913, the plaintiff was duly appointed by the workmen employed at the Meiros Colliery to inspect the mine under the provisions of s. 16 of the Coal Mines Act, 1911. (1) The plaintiff had been a practical working miner and had had not less than five years' experience of underground work as required by s. 16. Notice of the plaintiff's appointment was duly given to the defendants' manager.

On November 25, 1913, the plaintiff applied to the manager of the colliery for permission to make the inspection provided for

---

or to interfere with the weighing, or with any of the workmen or with the management of the mine; but shall be authorised only to take such account or determine such deductions as aforesaid, and the absence of a check weigher from the place at which he is stationed shall not be a reason for interrupting or delaying the weighing or the determination of deductions at such place respectively, but the same shall be done or made by the person appointed in that behalf by the owner agent or manager, unless the absent check weigher had reasonable ground to suppose that the weighing or the determination of the deductions, as the case may be, would not be proceeded with: Provided always that nothing in this section shall prevent a check weigher giving to any workman an account of the mineral gotten by him, or information with respect to the weighing, or the weighing machine, or the tareing of the tubs or trams, or with respect to the deductions or any other matter within the scope of his duties as check weigher, so always, nevertheless, that the working of the mine be not interrupted or impeded."

(1) Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), s. 16: "(1.) The workmen employed in a mine may, at their own cost, appoint two of their number or any two persons, not being mining engineers, who are or who have been practical working miners and have had not less than five years' experience of underground work, to inspect the mine, and the persons so appointed shall be allowed once at least in every month, accompanied, if the owner, agent, or manager of the mine thinks fit, by himself or one or more officials of the mine, to go to every part of the mine, and to inspect the shafts, roads, levels, workings, air-ways, ventilating apparatus, old workings, and machinery, and shall, where an accident has occurred in a mine of which notice is required under this Act to be given, be allowed to go together with any person acting as legal adviser to the workmen, or with a mining or electrical engineer selected by the workmen, accompanied as aforesaid, to the place where the accident occurred, and to make such inspection as may be necessary for ascertaining the cause of the accident, subject, however, to the provisions of this Act requiring the place where an accident has occurred to be left as it was immediately after the accident."

C. A. 1915

DATE v. GAS COAL COLLIERIES, LIMITED.

by s. 16 of the Act of 1911, but permission was refused upon the ground that the plaintiff, being a person holding the appointment of check weigher under s. 13 of the Act of 1887, was not eligible for appointment under the provisions of s. 16 of the Act of 1911.

The plaintiff claimed a declaration that he was entitled to exercise all the powers conferred by s. 16 of the Act of 1911 upon a person appointed under that section to inspect a mine.

Bailhache J. gave judgment for the plaintiff. The defendants appealed.

Mitchell Innes, K.C., and *Harold Morris*, for the defendants.

Leslie Scott, K.C., and *A. T. James*, for the plaintiff.

[The arguments were to the same effect as in the Court below.]

Cur. adv. vult.

March 25. LORD READING C.J. read the following judgment:— The plaintiff was appointed by the workmen at the defendants' mine to act as check weigher, and duly discharged his duties in that capacity before and since October 29, 1913. On that date the plaintiff was appointed by the workmen to act as inspector of the mine under the provisions of s. 16 of the Coal Mines Act, 1911. Notification of his appointment was duly made to the defendants, and no objection was or could be taken by the defendants to his appointment, except upon the ground that a check weigher could not be appointed by the workmen to discharge the duties of inspector at the colliery where he is employed as check weigher.

This action is brought to obtain a decision that the plaintiff, notwithstanding that he was a check weigher, could be appointed inspector. Bailhache J. found in favour of the plaintiff, and the defendants appeal to this Court to reverse the judgment.

The appointment by the workmen of inspectors is now regulated by s. 16 of the Coal Mines Act, 1911, which was passed to consolidate and amend the law relating to coal mines. By this section "the workmen employed in a mine may, at their own cost, appoint two of their number or any two persons, not being

mining engineers, who are or who have been practical working miners and have had not less than five years' experience of underground work, to inspect the mine, and the persons so appointed shall be allowed once at least in every month, accompanied, if the owner, agent, or manager of the mine thinks fit by himself or one or more officials of the mine, to go to every part of the mine," and "shall, where an accident has occurred . . . . be allowed to go together with any person acting as legal adviser to the workmen, or with a mining or electrical engineer selected by the workmen, accompanied as aforesaid, to the place where the accident occurred, and to make such inspection as may be necessary for ascertaining the cause of the accident." This section reproduces the power of appointment of inspectors given to the workmen under earlier statutes (see 35 & 36 Vict. c. 76, s. 51, r. 30, and 50 & 51 Vict. c. 58, s. 49, r. 38) with amendments and additions. These statutory powers are intended to afford workmen at a mine the opportunity of examining the conditions of the mine by means of inspectors elected by themselves for that purpose, notwithstanding the existence of officials who are responsible for the safety of the mine. Prima facie the words of the section are sufficiently wide to include the appointment of a person as inspector who has been performing and will continue to perform the duties of check weigher. But it is contended on behalf of the defendants that by reason of the specific words of s. 13 of the statute of 1887 (a section still in force: see s. 126 and Fourth Schedule of the statute of 1911) a check weigher is prohibited from performing other acts than those authorized by this section, and that the general words of s. 16 of the statute of 1911 should be construed as limited by the specific words: see *De Winton* v. *Brecon Corporation* (1) and *Seward* v. "*Vera Cruz*," per Lord Selborne L.C. (2) If s. 13, sub-s. 3, contains a prohibition as contended by the defendants, there is no doubt this canon of construction would apply. The decision in this case depends upon the true meaning to be attributed to the language of sub-s. 3 of s. 13 of the statute of 1887. If it contains a prohibition to a check weigher to perform other duties than those of a check weigher, then s. 16 of the

(1) (1859) 28 L. J. (Ch.) 600. (2) (1884) 10 App. Cas. 59, at p. 68.

C. A. 1915

DATE v. GAS COAL COLLIERIES, LIMITED.

Lord Reading C.J.

statute of 1911 must be read with that limitation, and the plaintiff could not become both inspector and check weigher. If s. 13 does not contain a prohibition, there is nothing in the statutes to prevent the appointment of a check weigher as inspector. The statute of 1887, itself a consolidating and amending statute, enacted that "the persons who are employed in a mine and are paid according to the weight of the mineral gotten by them may, at their own cost, station a check weigher" to check the weight of the mineral and to determine correctly the deductions to be made. By an earlier statute this privilege had been conceded to the workmen to appoint their own representative to watch over their interests. Parliament, whilst giving the men this privilege, was careful to safeguard the interests of the employers. By sub-s. 3 of s. 13, passed in the interests of the employers, the powers of the check weigher at the mine are limited. He shall not be authorized in any way to impede or obstruct the working of the mine, or to interfere with the weighing, or with the workmen, or with the management of the mine. He shall be authorized only to take the account of the weights and to determine the deductions, but nothing in the section shall prevent him giving to the workman an account of the mineral gotten by him, or information with respect to the weighing or the tareing of the tubs or trams, or with respect to the deductions "so always nevertheless that the working of the mine be not interrupted or impeded." By sub-s. 4, if the check weigher does any of the acts which by sub-s. 3 he is not authorized to perform, or if he has done anything at the mine to the detriment of the owner or manager beyond the acts which under sub-s. 3 he is authorized to do, he may be removed, on sufficient cause being shown, by a Court of summary jurisdiction. The object of sub-s. 3 is to enumerate the acts which a check weigher is not authorized to do and which he is authorized to do by virtue of his appointment or in the exercise of his powers as check weigher. He is in that capacity strictly limited to doing that which the statute expressly permits or does not prohibit. There are no words expressly prohibiting him from acting at the mine in the capacity of inspector, and I do not think such a prohibition is to be implied from the language of

C. A.
1915
DATE
v.
GAS COAL COLLIERIES, LIMITED.
Lord Reading C.J.

the statute. By sub-s. 4, if he does any of the acts which under sub-s. 3 he is not authorized to do, he may be removed, and, in addition, he may be removed if he does certain other acts to the detriment of the mine owner, agent or manager: *Sykes* v. *Barraclough*. (1) The additional grounds of removal are to meet acts of a character which are not already covered by sub-s. 3, and the insertion of these additional grounds of removal serves to confirm the view I have expressed of sub-s. 3. He must not use his position as check weigher to interfere with the working of the mine.

The defendants further seek support for their contention by reference to s. 2, sub-s. 2, of the Coal Mines Regulation Act, 1908. By this sub-section, workmen in a mine became entitled to appoint one or more persons "whether holding the office of check weigher or not," as timekeeper at the pit head, and it is argued that the insertion of these words shows that when the Legislature intended to permit a check weigher, if appointed, to act as timekeeper, it was necessary to introduce express words into the statute. This argument does not impress me, inasmuch as Parliament may have thought that the duties of check weigher and timekeeper might possibly at some moment have to be performed at or about the same time, and that, in any event, it would be wise to remove any possible doubt. The insertion of these words in this Act does not, in my opinion, affect the construction to be placed upon s. 13, sub-s. 3, of the Act of 1887.

It is further urged by the defendants that if a check weigher was appointed to act as inspector, there would be no one who could perform the duties of check weigher whilst he was away. There is, however, power under the Coal Mines (Weighing of Minerals) Act, 1905, s. 1, sub-s. 1, to appoint "a deputy to act in the absence of the check weigher for reasonable cause." If the men have selected a check weigher as inspector, I think that absence from his duties as check weigher to perform the duties of inspector should be regarded as reasonable cause for his absence, although it is not necessary to decide it in this case. Inspection must be infrequent in comparison with check weighing, which is of daily occurrence, and the use of the powers under

(1) [1904] 2 K. B. 675.

C. A.
1915

DATE
v.
GAS COAL COLLIERIES, LIMITED.

Lord Reading C.J.

the statute for the purpose of inspection must, of course, be exercised reasonably. Moreover it is to be observed that s. 16 of the Act of 1911 expressly excludes persons who are mining engineers from appointment as inspectors. If it was the intention also to exclude check weighers, one would have expected to find similar words applicable to check weighers, more especially as the person appointed must be or have been a practical working miner with at least five years experience of underground work, and such a person might well be selected by the workmen as check weigher. That the appointment of a check weigher to act also as inspector is not entirely unknown hitherto, is shown by reference to the case of *Indian* v. *Colquhoun*. (1) Unless there are words in the statute which must be construed as limiting the free selection by the workmen of a person to fill the duties of inspector on their behalf, I think they are entitled to choose whom they please, provided the person appointed has the qualifications and none of the disqualifications expressly stated in the section. In my opinion, there are no words in the statutes which mean that a check weigher cannot be appointed to perform the duties of inspector whilst retaining his appointment of check weigher.

In my opinion the judgment of Bailhache J. was right, and the appeal must be dismissed with costs.

SWINFEN EADY L.J. read the following judgment:—The plaintiff is check weigher at the Meiros Colliery, and has been appointed by the workmen employed at the same colliery to inspect the mine, under the provisions of s. 16 of the Coal Mines Act, 1911. The question is whether this latter appointment is valid, or whether the position of the plaintiff as check weigher at the colliery renders him ineligible for the appointment.

The plaintiff possesses the statutory qualifications. He is not a mining engineer, but has been a practical working miner, and has had upwards of five years' experience of underground work. Prima facie, therefore, the plaintiff is eligible for the appointment.

It was urged, however, that the duties of an inspector must necessarily involve some interference with the management of a mine, and that s. 13, sub-s. 3, of the Act of 1887 contains an

(1) *Times* newspaper, January 18, 1890.

express prohibition against a check weigher's interference; but in my opinion this sub-section cannot be construed as applying to occasions when the person is acting in some capacity other than that of check weigher.

Some reliance was placed by the defendants upon s. 2, sub-s. 2, of the Coal Mines Regulation Act, 1908, which provides for the appointment of a person "whether holding the office of check weigher or not," to be at the pit head to observe the times when men are being lowered or raised, and it was urged that this express enactment, permitting the employment of a check weigher in another capacity, showed that the Legislature considered such an enactment necessary; and that in the absence of a similar provision enabling him to hold the position of inspector, the proper inference to draw was that the Legislature did not intend that he should be considered eligible. It is probable that the Legislature, in dealing with the appointment of timekeepers, inserted the provision "whether holding the office of check weigher or not," as they considered that the two offices might be conveniently combined, and the duties of both discharged by the same person at the same time; but whether this be so or not the language of the Act of 1908, s. 2, sub-s. 2, is not sufficient to render check weighers ineligible by implication, when there is an express qualification clause excluding mining engineers but not excluding check weighers. It may well be that the Legislature did not contemplate that check weighers would be appointed inspectors, and there may be practical difficulties in the same person discharging the duties of both offices. A check weigher has his own statutory duties to discharge, and a deputy check weigher has only power to act, under the Coal Mines Act, 1905, "in the absence of the check weigher for reasonable cause"; it may well be that the Legislature did not intend that a check weigher should voluntarily accept other positions, whether at the same or other collieries, and thus place himself in a position where he is unable to discharge his duties as check weigher, and then be able to say that he was absent "for reasonable cause," and claim to do his duty by deputy. I leave open, however, until it arises, the question whether under such circumstances the deputy check weigher would be entitled to act. If, however, the true

C. A. 1915

DATE v. GAS COAL COLLIERIES, LIMITED.

Swinfen Eady L.J.

position is that the check weigher's absence from his duties as such would not be owing to "reasonable cause," still this consequence would not render a check weigher absolutely ineligible for appointment as inspector. If the deputy check weigher had not become entitled to act, the consequence to the miners would be that when the check weigher was engaged in some other occupation or employment which he had accepted, the miners would be left without a check weigher. But they might prefer being left in this position to not having the check weigher as inspector, and the matter is one for them to determine.

I concur in the view taken by the judge below, that the plaintiff is entitled, in this action, to the declaration he claims. However inexpedient such an appointment may be, and to whatever difficulties in practice it may give rise, the plaintiff is not actually ineligible for appointment by reason of being check weigher.

BRAY J. read the following judgment:—The question in this action is whether the workmen, under s. 16 of the Coal Mines Act, 1911, were entitled to appoint a check weigher as an inspector. Sect. 16 says: "The workmen employed in any mine may at their own cost appoint two of their number or any two persons not being mining engineers who are or who have been practical working miners and have had not less than five years' experience of underground work to inspect the mine," &c. There is no doubt that the check weigher who was appointed came within the terms of s. 16, and was not one of the excepted persons; but it is said that he was disqualified by s. 13 of the Act of 1887. If it be clear that he was so disqualified, I do not think the words of s. 16 of the Act of 1911 would remove that disqualification. It is true that the words of s. 16 are quite clear and unambiguous, but according to the accepted rules for the construction of statutes, I do not think they can be construed as repealing the disqualification imposed, if it was imposed, by s. 13 of the Act of 1887. But if the two statutes can fairly be read so as not to be inconsistent, I think they should be so read. Now, there is no express disqualification to be found in s. 13, but the contention is that there is an express prohibition in sub-ss. 3 and 4 forbidding the check weigher to do acts which he would have to do as

inspector. I think these two sub-sections should be considered separately.

Sub-s. 3 states that the check weigher shall not have authority to do certain things but shall only have authority to do certain others, and provides that the weighing may take place in his absence, unless he had been led to suppose that it would not be proceeded with. It strictly defines his authority as check weigher. So far it contains no prohibition, express or implied, as to his conduct when not acting as check weigher. It does not prohibit him from being absent. When he is absent, the workmen lose the benefit of the protection of their interests. The mine owner does not suffer. But then there comes a proviso limiting the information he may give to the workmen. It may be that this applies to the time when he is off duty as well as to the time when he is on duty, because information might be given at any time. But if this is so, I do not think it affects the construction of the earlier part of the sub-section. It is in the form of a proviso giving him a power to give limited information. It is not in the form of a prohibition. Its object is to prevent a certain construction being put upon the earlier words. I cannot read this sub-section as containing a prohibition forbidding the check weigher from performing other lawful duties in relation to the mine, nor as disqualifying him from being appointed by the workmen under sub-s. 1 of s. 16 of the Act of 1911.

Sub-s. 4 gives the owner of the mine power to appeal to a Court of summary jurisdiction for the removal of the check weigher on certain specified grounds, and this has been held, and rightly held, to apply to the check weigher's conduct when off duty as well as when on duty, because the words used are wide, and there is nothing to limit them to his conduct when on duty. This sub-section does not, in my opinion, alter the construction of sub-s. 3, nor does it contain a prohibition.

It was argued that if the check weigher performed his duty as inspector, he would, or might have to do something which would, under this sub-section, make him liable to be removed. I will consider that. The duties and powers of the persons appointed by the workmen under s. 16 of the Act of 1911 are defined by that section. They are to be allowed to go once at least every

C. A. 1915

DATE v. GAS COAL COLLIERIES, LIMITED.

Bray J.

month, accompanied, if the owner thinks fit, by himself or one or more of the officials, to every part of the mine, and to inspect the shafts, roads, &c., and the machinery, and if there is an accident they are bound to go together with any person acting as legal adviser to the workmen, or with a mining or electrical engineer selected by the workmen, to the place where the accident happened, and to make such inspection as may be necessary for ascertaining the cause of the accident, subject to the provisions of the Act requiring the place where the accident happened to be left as it was immediately after the accident. Their power and duty, so far, is to inspect, and inspect only. That does not seem to me to involve any impeding or interruption of the working of the mine, or interference with the weighing, or with any of the workmen, or with the management of the mine within the meaning of sub-ss. 3 or 4 of s. 13 of the Act of 1887; nor does it entail any giving of information, or the doing of any act to the detriment of the owner, agent or manager of the mine within sub-s. 4. The mere fact that it is necessary for him to go down and come up the mine in order to make his inspection need not impede the working of the mine. He must wait for a convenient opportunity to be taken up and down.

Then under sub-s. 2 of s. 16 of the Act of 1911 facilities are to be offered, but they are to be offered to whomever the men appoint; and lastly, he is to make and sign a full and accurate report of the result of inspection. I can see nothing in his prescribed duties that would make the check weigher do anything which would justify an application to remove him under s. 13, sub-s. 4, unless he were to abuse the powers given to him. It is no more likely, and probably less likely, that a man in the position of a check weigher would abuse his powers than any other workman or person appointed under s. 16 of the Act of 1911.

Counsel for the coal owners referred us to s. 99 of this Act, but that section applies to an inspector appointed under s. 97, and not to a person appointed under s. 16. So much for the Act of 1887.

The next Act to be considered is the Coal Mines (Weighing of Minerals) Act, 1905, which by s. 1 gives power to the workmen to appoint a deputy check weigher to act in the absence of the

C. A.
1915
DATE
v.
GAS COAL COLLIERIES, LIMITED.
Bray J.

check weigher for reasonable cause, and the expression "check weigher" in the Act of 1887, and that Act, is to include any such deputy check weigher during such absence as aforesaid. I do not attach so much importance to that section as was attached to it by the defendants' counsel. If there was a disqualification by s. 13 of the Act of 1887, I do not think the passing of this Act would remove it, although the inconvenience which would otherwise be caused by the absence of the check weigher from his duties would be removed. I do not think it is necessary to construe the words "absence from reasonable cause," but I am inclined to think that if he were absent performing his duties under s. 16 of the Act of 1911, that that would be reasonable cause.

The next Act is the Coal Mines Regulation Act, 1908, commonly called the Eight Hours Act. That Act, by s. 2, sub-s. 2, gave the men power to appoint one or more persons, whether holding the office of check weigher or not, to be at the pit head to observe the times of lowering and raising the men, and the provisions of the Acts of 1887 and 1905 relating to the check weigher were to apply to any person so appointed. It was argued that the express words authorizing the appointment of the check weigher showed that but for these words he could not have been appointed. I think those words were probably inserted to avoid any possible doubt on that point, and perhaps to indicate that the check weigher would be a very proper person to appoint, he having duties close to the pit head. However that may be, I do not think they show any intention to put a construction upon s. 13 of the Act of 1887, much less to alter it.

I am of opinion that the judgment of Bailhache J. was right, and ought to be affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for defendants: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

F. O. R.

K. B. D.
1915
Feb. 15, 22.
C. A.
March 22, 23.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

THE KING *v.* LONDON COUNTY COUNCIL. *Ex parte* LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED.

Theatre — Licence — Music — Cinematograph — Discretion of Licensing Authority—Theatre Company with Alien Enemy Shareholders—Terms and Conditions—Disorderly Houses Act, 1751 (25 *Geo.* 2, *c.* 36), *s.* 2—*Cinematograph Act*, 1909 (9 *Edw.* 7, *c.* 30), *s.* 2.

The terms and conditions which a county council may impose on the grant of a licence under s. 2 of the Cinematograph Act, 1909, are not limited to terms and conditions for securing safety; and therefore the matters to which a county council may have regard in considering an application for a licence under the Act are not confined to matters relating to safety.

London County Council v. *Bermondsey Bioscope Co.* [1911] 1 K. B. 445 approved.

The London County Council, as the licensing authority under the Disorderly Houses Act, 1751, and the Cinematograph Act, 1909, refused to grant the renewal of music and cinematograph licences to a limited company registered in England on the ground that the large majority of its shares were held by alien enemies. A rule having been obtained for a mandamus directed to the Council requiring them to hear and determine the application according to law, upon the ground that they were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders in the company :—

Held by the Court of Appeal, that, apart altogether from the question whether or not the alien enemy shareholders were entitled to vote, the Council could in the exercise of their discretion refuse to grant licences to a company the majority of whose shareholders were alien enemies.

Rules Nisi directed to the London County Council to show cause (1.) why a writ of mandamus should not issue commanding them to hear and determine certain applications by the London and Provincial Electric Theatres, Limited, for the renewal of music licences in respect of three theatres, and (2.) why a writ of mandamus should not issue commanding them to hear similar applications for cinematograph licences in respect of the same theatres.

The facts are fully set out in the judgment of Lord Reading C.J., but shortly stated they are as follows :—The applicants, an

English company formed in 1909, had for several years in succession applied for to, and obtained from, the London County Council, as the licensing authority in such matters, music and cinematograph licences in respect of the theatres in question. In August, 1914, when war broke out between Great Britain and Germany, three of the six directors of the company were of German nationality and resided in Germany, and the greater number of the shares were held by alien enemies. After the outbreak of war no communications passed between the company and the alien enemy shareholders, and a resolution was passed by the board of directors declaring the positions of the three German directors vacant as from August 5, 1914. In November and December, 1914, the company's applications for the renewal of the music and cinematograph licences for the three theatres were refused by the London County Council on the ground that three of the six directors were alien enemies, that most of the shares were held by alien enemies, and that the control of the company was in the hands of alien enemies.

The grounds upon which the rules were moved were (1.) that the London County Council failed to hear and determine the applications according to law; (2.) that they failed to act judicially in determining the applications; and (3.) that they were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders and directors in the applicant company.

Sir R. B. Finlay, K.C., and *Bodkin*, for the London County Council, showed cause. The power to grant music licences is conferred by s. 2 of the Disorderly Houses Act, 1751, which empowers quarter sessions "to grant such licences as they in their discretion shall think proper," but now the jurisdiction to grant those licences is vested in the county council: see the Local Government Act, 1888, s. 3, sub-s. (v.). Cinematograph licences, that is, licences for the exhibition of pictures by means of a cinematograph for the purposes of which inflammable films are used, are granted under the Cinematograph Act, 1909, s. 2, sub-s. 1 of which provides that "A county council may grant licences to such persons as they think fit to use the premises

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine." As to both music and cinematograph licences it is therefore clear that the London County Council have a discretion with reference to the proposed licensees; and the sole question is whether, in exercising their jurisdiction, the London County Council were entitled to take into account the fact that the control of the company applying for the licences was in alien enemies. In dealing with such licences it has been decided that the licensing authority may inquire whether the proposed licensees are fit and proper persons; in other words the licensing authority are entitled to consider the public interest: see *Ex parte Harrington.* (1) They cannot, of course, allow considerations to influence their decision which ought not to have influenced it: *Reg.* v. *West Riding of Yorkshire County Council.* (2) To take the instance given by Cave J. in the *Law Journal* report of that case, they cannot refuse an application on the ground that the applicant has red hair or for some equally apparent irrelevant reason. The Council were, however, entitled to inform their minds as to all relevant facts: see *Rex* v. *Howard* (3); and the fact that the majority of the shares of the applicant company were held by alien enemies was a very material matter for consideration. The possibility, if the licences were granted, of the exhibitions being worked in a way detrimental to the interests of this country, as for example by discouraging recruiting, was a relevant matter for the Council to consider. The fact that the applicants are an English registered company does not put them in any better position than an individual applicant; the Council could refuse a licence to a British-born subject if, for instance, they considered it likely that he would carry on the theatre in a way which was antagonistic to the interests of this country. The Court of Appeal's decision in *Continental Tyre and Rubber Co.* v. *Daimler Co. and Others* (4), that an English company can sue in this country

(1) (1888) 4 Times L. R. 435. (M.C.) 136.
(2) [1896] 2 Q. B. 386; 65 L. J. (3) [1902] 2 K. B. 363.
(4) [1915] 1 K. B. 893.

although practically the whole of its shares are held by alien enemies, does not touch this case. The Court was not there considering any question of discretion, which is the point here.

[LORD READING C.J. From the beginning of the war have not the rights of the German directors and shareholders been suspended?]

The property in their shares is not taken away from the alien enemy shareholders, and the fact that they might possibly send proxies was a matter which the Council might take into their consideration. It was, however, never suggested to the Council, or when the rules were moved, that the control of the company, during the duration of the war, was purely in the English shareholders. It was assumed throughout that the alien enemy shareholders were still effective shareholders and might send proxies.

[LORD READING C.J. You may assume for the present that as this point was not gone into before the Council we cannot consider it.]

The only question, therefore, is whether the Council honestly exercised their discretion. It is submitted that they did. The extent of their discretion in regard to the cinematograph licences is shown by the fact that they can impose a condition that the cinematograph theatre shall not be opened on certain days: see *London County Council* v. *Bermondsey Bioscope Co.* (1); see also *Theatre de Luxe* (*Halifax*) v. *Gledhill* (2) and *Ellis* v. *North Metropolitan Theatres.* (3) [They also cited *Rex* v. *Cork Justices.* (4)]

Sir Edward Carson, K.C., and *W. Frampton*, in support of the rules. At the time the licences were applied for the London County Council had the simple fact before them that the applicants were an English company—a company which was a distinct entity from its shareholders (see *Continental Tyre and Rubber Co.* v. *Daimler Co.* (5)), and a company which, as a matter of law, since the commencement of the war, could not be interfered with or controlled by the alien enemy shareholders. In dealing with applications for licences the Council are bound by

(1) [1911] 1 K. B. 445.
(2) Ante, p. 49.
(3) Ante, p. 61.
(4) [1906] 2 I. R. 415.
(5) [1915] 1 K. B. 893.

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

the same principles as are binding on justices in determining questions which come before them for judicial decision: *Reg.* v. *London County Council.* (1) The Council's discretion must be exercised according to the rules of reason and justice, according to law and not humour: per Lord Halsbury L.C. in *Sharp* v. *Wakefield.* (2) It must be exercised, therefore, not capriciously, arbitrarily, or on extraneous considerations: see *Reg.* v. *Adamson* (3); *Reg.* v. *Bowman* (4); *Reg.* v. *Cotham* (5); *Rex* v. *Shann* (6); *Rex* v. *Hyde Justices.* (7) The mere fact that in an English company the majority of the shares are held by alien enemies is extraneous to the subject-matter of the company's applications. The position might have been different if there had been any evidence before the Council suggesting the likelihood of the exhibition of films which were detrimental to this country's interests, but in the absence of such evidence the matter considered by the Council as justifying their refusal of the licences was altogether extraneous. This is especially clear in reference to the more important of the two kinds of licences applied for, namely, those under the Cinematograph Act, 1909. As the applicants are entitled to show non-inflammable films without any licence, it is clear that the subject for the consideration of the Council is, whether the exhibition can be given with safety to the public. That this is so is also manifest from the language of the title of the Act, which says that it is "An Act to make better provision for securing safety at cinematograph and other exhibitions." In order, therefore, to justify the refusal of a cinematograph licence the Council must be satisfied that something is likely to be done which would lead to an infringement of the Act.

[BRAY J. Under the Cinematograph Act, 1909, the Council are not limited to the consideration of questions affecting the safety of the public. That was expressly decided in *London County Council* v. *Bermondsey Bioscope Co.* (8)]

When it is borne in mind that the company had already been the

(1) [1892] 1 Q. B. 190.
(2) [1891] A. C. 173, at p. 179.
(3) (1875) 1 Q. B. D. 201.
(4) [1898] 1 Q. B. 663.
(5) [1898] 1 Q. B. 802.
(6) [1910] 2 K. B. 418, at p. 435.
(7) [1912] 1 K. B. 645.
(8) [1911] 1 K. B. 445.

grantees of similar licences and were asking for their renewal, the question for the Council was whether anything had happened which would lead them to anticipate that the applicants would not be, as they had been in the past, fit and proper persons to hold the licences. They were the same persons; they are an English company against whom no charge has ever been made.

Cur. adv. vult.

Feb. 22. The following judgments were read :—

LORD READING C.J. The London County Council refused to grant to the London and Provincial Electric Theatres, Limited, the renewal of licences for the exhibition of inflammable cinematograph films and for the performance of music at three theatres within their jurisdiction for these purposes. The ground of the refusal was that three of the six directors of the company were alien enemies, that most of the shares in the company were held by alien enemies, and that the control of the company was in the hands of alien enemies. The company contends: (1.) That the Council failed to hear and determine the applications according to law; (2.) that they failed to act judicially in determining the applications; and (3.) that the Council were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders and directors in the company. Upon these grounds the company seeks to obtain from this Court a writ of mandamus directed to the London County Council commanding them to hear and determine the applications for the licences according to law. The Court granted a rule upon the application of the company, and the London County Council appeared to show cause why the writ of mandamus should not issue.

The jurisdiction of the London County Council with regard to the exhibition of inflammable cinematograph films is derived from the Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 2, sub-s. 1, which provides that "A county council may grant licences to such persons as they think fit to use the premises specified in the licence" for this purpose and on such terms and conditions and under such restrictions as the council may

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

Lord Reading C.J.

determine. The jurisdiction to grant music licences is derived from the Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 2, and the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3, whereby the London County Council were "authorised and empowered to grant such licences as they in their discretion shall think proper." The granting of the licences either for exhibitions of cinematograph films or for the performance of music is therefore in the discretion of the Council. The question for the consideration of the Council, subject to a point hereinafter mentioned upon the Cinematograph Act, was whether, acting with due regard to the public interest, the renewal of the licences should be granted to the secretary of the company on behalf of the company.

The material facts are as follows:—The London and Provincial Electric Theatres, Limited, is an English company formed in December, 1909. Invitations were issued to the public to subscribe the necessary capital. The response was insufficient, and eventually three persons of German nationality residing at Mannheim, in the empire of Germany, subscribed more than half the number of shares issued, and thus obtained the control of the company. After the capital had been subscribed several theatres for the exhibition of cinematograph films were constructed in accordance with plans approved by the Council, and, it is said, at an expenditure of 100,000*l*. Both cinematograph and music licences were obtained from the Council in respect of the above-mentioned three theatres of the company, and were in the ordinary course renewed in successive years. At the date of the last applications for the renewal of the licences this country was at war with Germany. Apart from considerations arising from the war it is not contended that there was any ground for refusing the applications. No complaint was made as to the conduct of the theatres by the company, neither was it suggested that there had been any breach of the terms and conditions prescribed by the licences. On October 20, 1914, the secretary of the company, a natural-born British subject, who was the licensee on behalf of the company, applied for a renewal of the music licences for the three theatres, and subsequently, in answer to a written request by the Council, supplied a list of all the persons employed, with

their names and addresses and particulars of their nationality, and a certificate showing that the licensee and the staff at the theatres were natural-born British subjects. On November 11 notice was received by the company to attend the next day before the Theatres Committee of the Council as questions might arise with reference to the nationality of the directorate and shareholders of the company. The company appeared by counsel before the committee, and evidence was given which established, inter alia : (1.) That at the declaration of war three of the six directors of the company were of German nationality and resided in Germany and the other three directors were natural-born British subjects. (2.) That the company had been advised that the alien enemy directors on the declaration of war ceased by operation of law to be directors of the company until peace had been restored. (3) That at the date of the applications to the Council 110,000 preference shares of 10*s*. each had been issued by the company and 20,000 deferred shares. Of the preference shares 92,600 had been issued to and were then held by forty-nine shareholders who were and are resident in Germany and are alien enemies and 17,400 to seventy-six persons resident in the United Kingdom. (1) Of the deferred shares the majority were then held by alien enemies. The preferred shares have received dividends from the year 1910 to 1913 inclusive. No dividend has ever been paid in respect of the deferred shares. By the articles of association of the company every member is entitled on a poll either in person or by proxy to one vote for every share held by him. At a general meeting of the shareholders every member present in person is entitled to one vote only. (4.) That about 200 persons were employed by the company at all their theatres. None of such persons was of enemy nationality ; one man, an Austrian, had been employed at the head office, but he was discharged immediately the regulations under the Aliens Restriction Act, 1914, were issued.

It was contended that during the war the alien enemy directors

(1) This statement appears to be taken from the evidence before the committee. It will be observed that there is some discrepancy between the figures and those given by Buckley, L.J., in his judgment, post, p. 486, but it is not considered that this discrepancy is material.

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte*.

Lord Reading C.J.

ceased to act as directors and that the alien enemy shareholders could neither receive any dividend nor otherwise obtain money for their shares, and that considerations based upon the enemy character of part of the directorate and of the shareholders holding the majority of the shares had no bearing upon the merits of the applications. The committee retired to consider their decision, and upon returning announced that they should not recommend the Council to grant the renewal of the music licences. On November 27 the applications for the renewals came in the ordinary course of such matters before the Council. The facts and considerations above stated were fully presented by counsel for the company. Great stress was laid by him upon the hardship and injustice which, according to his contention, would be inflicted upon the English shareholders and upon the persons employed by the company in the event of a refusal by the Council. Attention was directed to the law forbidding the payment of dividends or any moneys to alien enemies and to the provisions of the Trading with the Enemy Amendment Act, 1914. Questions were asked by members of the Council and speeches were made, some in favour of, others against, the granting of the applications. Eventually the Council refused to renew the licences, forty-one members voting for the refusal and thirty-one against it.

On December 16, 1914, the assistant manager of the company appeared before the Theatres Committee of the Council to apply for the renewal of the licences for the exhibition of inflammable films at the three theatres. The facts and arguments were substantially the same as those presented to the committee upon the applications for the music licences. The committee decided also to refuse to grant the renewal of these licences.

Upon these facts it is first contended that the London County Council had acted, to quote the language of the affidavit of Mr. Redfern, the secretary of the company, "on a preconceived intention to refuse to renew the licences on the ground of the nationality of some of the company's shareholders." I understand this to mean that the Council before proceeding to hear and determine the applications had already decided or arranged to refuse them. It is unnecessary to discuss this contention at

any length, because in my judgment there is not a tittle of evidence in support of it. Further, I am quite satisfied that there was in fact no such understanding or arrangement.

The second and more serious contention is that the Council have not exercised their discretion in a judicial spirit in the sense that they have allowed extraneous considerations to affect their decisions. If they have allowed themselves to take into consideration matters which had no bearing upon the merits of the case before them, but which nevertheless influenced their minds in arriving at their decision, they have not exercised their discretion properly and have not heard and determined the case according to law: see *Reg.* v. *Bowman*. (1) The discretion vested in the Council must be exercised within regular limits; in particular, regard should be had only to the merits of the matter before the Council. Although the Council does not sit as a Court of law, they must exercise their discretion in a judicial spirit: see *Sharp* v. *Wakefield*. (2) The difficulty lies in the application of these principles to the present case. The Council came to the conclusion that a company whose directorate and shareholding were constituted as the directorate and shareholding of the London and Provincial Electric Theatres, Limited, was not a suitable company to which or to whose representative in their discretion and opinion licences should be granted. It must be borne in mind that this Court, in determining whether or not the mandamus should issue, is not exercising appellate jurisdiction. We are not entitled to decide according to the view we should have taken in the first instance had the matter come before us. We should only order the mandamus to issue if we came to the conclusion that the Council, by taking into consideration the enemy character of the constitution of the company, had allowed their minds to be influenced by extraneous considerations. The Council in these matters are the guardians of the public interest and welfare. If the Council are of opinion that the exhibition of cinematograph films accompanied by music should not be entrusted to a company so largely composed of persons whose interest or whose desire at the present time is

(1) [1898] 1 Q. B. at p. 666, per Wills J.

(2) [1891] A. C. at p. 179, per Lord Halsbury.

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

Lord Reading C.J.

or may be to inflict injury upon this country, can it be held as a matter of law that the Council have travelled beyond the limits allowed to them? I think not. I cannot hold that such considerations are extraneous or extra-judicial. These exhibitions exercise a powerful influence, often too powerful an influence, upon the minds of the young; sometimes also upon the minds of others. I cannot think that a Court of law would be justified in treating such considerations as beyond the limits to which a man could look who was desirous of discharging his duty honestly to the best of his ability and with his mind directed solely to the public interest of the realm at a critical period of its history. At such a time suspicion as to the possible action or influence, direct or indirect, of enemies is naturally very rife, and an honest man might well think it wise to run no risk and to take precautions to guard against even the remote possibility of injury being caused to this country's interests which to others might appear wholly unnecessary and even unwise, perhaps unjust. If the majority of the members of the Council came to the conclusion that it was not suitable that such a company should at such a time be licensed to carry on such exhibitions, it cannot, in my opinion, be said to be an arbitrary exercise of discretion or to be based upon extraneous considerations.

The case of *Continental Tyre and Rubber Co.* v. *Daimler Co.* (1), recently decided by the full Court of Appeal, has been to some extent relied upon in support of the company's contention. That decision has only a remote bearing, if any, upon the present case. In that case the Court held that a company formed under our laws and carrying on business in this country could recover a debt due to the company notwithstanding that its directors and shareholders were alien enemies, on the ground that the entity alone could be regarded and that in no circumstances could the debt be treated as a debt to the individual shareholders. The Court was pronouncing upon the legal right of the company to sue and enforce its claims for payment of a debt. No question of the exercise of discretion by the Court arose or could arise in such a case.

With regard to the applications for the cinematograph

(1) [1915] 1 K. B. 893.

licences, which are indeed the more important applications in this case, as the music licences would be of very little value to the company without the cinematograph licences, it was urged by Sir Edward Carson that under the Cinematograph Act, 1909, the powers vested in the Council are restricted to making provisions and imposing conditions for securing the safety of the public and other persons at the exhibition of inflammable films, and that therefore the Council could not take into consideration the enemy character of the directorate or shareholding of the company. It was pointed out by him that the jurisdiction of the Council is confined to the granting of licences for the exhibition of inflammable films and does not extend to the exhibition of non-inflammable films, and he argued that the statute was passed to protect the public against the risk of fire or other risks of a similar character when visiting the exhibition. It is not open to us in this Court to consider this argument, inasmuch as it has already been decided in *London County Council* v. *Bermondsey Bioscope Co.* (1) that the powers given to the Council are not confined to securing the safety of the public, but extend to imposing conditions such as that the premises shall not be open on Sundays, Good Friday, or Christmas Day. It is important to observe that the case on behalf of the London and Provincial Electric Theatres was presented to the Council and argued before them upon the basis that the enemy shareholders might possibly, in certain events, exercise control over the affairs of the company during the war. It seems to have been assumed throughout that the control of the company remained with the alien enemy shareholders notwithstanding the war, and that they could in the event of a poll exercise their right of voting by means of proxies, which, I suppose, would be forwarded indirectly through neutral countries. We came to the conclusion that, having regard to the presentment of the case to the Council, we could not now consider whether the control of the company was not since the war wholly in the hands of the shareholders in the United Kingdom on the ground that such proxies would have been null and void. It might have been urged that the appointment of a person in this country to act

(1) [1911] 1 K. B. 445.

1915

REX
v.
LONDON
COUNTY
COUNCIL.
LONDON AND
PROVINCIAL
ELECTRIC
THEATRES,
LIMITED,
Ex parte.

Lord Reading
C.J.

here as agent for an alien enemy would be an infringement of the law relating to trading with the enemy, and would constitute a commercial intercourse or transaction between subjects of this country and the enemy country which is prohibited at common law and also by statute. In consequence of the course taken before the committee of the Council we refused to consider this point on the application for the mandamus, as we were of opinion that whatever our decision as to the validity of proxies might be it could not in the circumstances affect our decision in this case as the point had never been even mentioned to the Council. I desire, however, to guard against the possible assumption that this Court has decided that even if the control of the company had been in the hands only of the British shareholders, and that even if in law the voting powers of the alien enemy shareholders could not be exercised during the war, no mandamus could issue to the Council if they had based their decision upon the control of the company being in its alien enemy shareholders. The point is not open in this case for the reasons I have given, but I desire to leave it open. I wish, however, to add that certainly I should require argument to convince me that a proxy issued by an alien enemy during the war to a British subject to vote in this country for the alien enemy is not against the law and therefore null and void.

In my opinion both rules should be discharged with costs.

BRAY J. In this case the applicants, the London and Provincial Electric Theatres, Limited, sought to make absolute a rule for a mandamus directed to the London County Council commanding them to hear and determine their application for the renewal of cinematograph licences in respect of three theatres, and a similar rule in respect of the renewal of music licences in respect of the same theatres. The grounds alleged were: (1.) That the London County Council had failed to hear and determine the applications according to law; (2.) that they failed to act judicially in determining the applications; and (3.) that the London County Council were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders and directors in the applicant company.

It is unnecessary for me to state the facts; they have been fully stated in my Lord's judgment.

I will take the case of the cinematograph licences first. The London County Council are authorized to grant and renew these licences by s. 2, sub-s. 1, of the Cinematograph Act, 1909, which is in these terms: "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to the regulations of the Secretary of State, the council may by the respective licences determine." It has been decided by this Court in *London County Council* v. *Bermondsey Bioscope Co.* (1) that the terms and conditions on which licences may be granted are not confined to conditions relating to safety. This decision has been confirmed in two subsequent cases before this Court, and is clearly binding on us if we differed from it, which I certainly do not. It follows, I think, from that that when the London County Council are considering as to the fitness of persons to whom licences are to be given they are not confined to considerations of safety alone. The persons must be such as they think fit, that is, fit to hold licences for giving cinematograph exhibitions. The London County Council are not a judicial body but an administrative body, but in exercising the authority conferred upon them they must exercise it fairly and impartially and must act according to the rules of reason and justice: see *Royal Aquarium* v. *Parkinson*. (2) In considering the fitness of the persons the Council must not be guided by extraneous considerations. It is clear that in this case the Council were guided by the consideration that the large majority of the shareholders were alien enemies, and the question for us is whether this was an extraneous consideration. It seems to me to be clearly permissible for the Council to consider when a company is the applicant who are the persons who control the company. If it clearly appeared that such persons were not fit persons to have the licences the licences ought not to be granted. Next, is it permissible to consider whether such persons are alien enemies? These exhibitions have a strong influence on the minds of the

(1) [1911] 1 K. B. 445. (2) [1892] 1 Q. B. 431; see p. 445.

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

Bray J.

spectators—in some cases a bad influence. Alien enemies have a strong motive to injure this country, and there would be a risk of their exercising this influence contrary to the interests of this country. It is said that there must be evidence that such an injury ought to be anticipated. It is impossible that there should be such evidence. There has been no experience which could afford such evidence. Is it not sufficient that in the opinion of the members, or the majority of the members, of the London County Council there is such a risk? They cannot wait and see. The licence is for a year. If there is such a risk, why is the risk to be run? It seems to me to be entirely a matter for the Council in their discretion to say whether or not it is desirable in the interest of the public that licences should be granted to a company controlled by alien enemies. It is not, in my opinion, an extraneous consideration. The Legislature has thought fit to leave it to the Council to say whether the applicants are fit persons, and we cannot direct them to hear and determine the matter because we might think—and I am far from saying I do so think—that these were fit persons.

But it was argued before us that being alien enemies the shareholders can no longer exercise their right of voting and cannot therefore, during the war, control the company. It is clear that no such point was taken before the Council or the Theatres Committee. The arguments, of which we have a shorthand note, proceeded upon the footing that the German shareholders could still vote. Again, when the rule was moved for no such point was raised, and, more important still, it is not stated in the rule as one of the grounds. The second ground does not in my opinion raise it, nor was it intended that it should. I do not think it is open to the applicants to raise it now. This is sufficient to decide the case against the applicants, because in my opinion there is not the slightest ground for saying that the members of the Council had acted on a preconceived intention to refuse the licences, and on these grounds I am of opinion that the rule should be discharged. I desire to express no opinion as to whether alien enemies can exercise their right to vote by proxy or otherwise, or as to whether, if they cannot, it follows from that that they can have no control, nor do I desire

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

to express an opinion upon the point whether, if the Council wrongly decided either in law or fact that the company was under the control of the German shareholders, this Court could order the Council to hear and determine the application afresh.

On the same grounds I am of opinion that the rule with regard to the licences for music should also be discharged.

SHEARMAN J. I am of the same opinion. According to the authorities which have been referred to the County Council had the same discretion upon both applications to consider who were fit and proper persons to obtain these licences and in arriving at their decision to consider the public interest. These two rules were obtained mainly upon the allegation that in considering the fact that the majority of the shareholders of the applicant company were alien enemies the Council were considering extraneous matter and that their decision was based upon this fact. The answer of those seeking to discharge the rule is that, as the majority of the shareholders are likely to have a voice in the direction of the entertainment offered to the public, the fact in question is not extraneous. The discussion before the County Council rested upon the uncontested basis that the alien enemies who were shareholders could exercise at the present moment their ordinary rights as shareholders. It is now argued that this basis is wrong in law and that at the present moment the rights of the shareholders who are alien enemies are entirely suspended, and therefore, for the present, non-existent. This argument was first raised in the course of the discussion of the motions to discharge the rules. In my judgment it is too late to raise this contention now and to ask the Court to decide upon these applications some novel and difficult points of law. It seems to me that such a procedure would render the due administration of the licensing law very difficult. Upon the basis of what was treated as being the law when the applications were made to the London County Council it would, in my judgment, for the reasons given in the other judgments, be wrong to say that they considered and based their decision upon extraneous matter, and therefore both rules must be discharged.

Rules discharged.

J. S. H.

C. A. 1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

The London and Provincial Electric Theatres, Limited, appealed.

March 22, 23. *G. Elliott, K.C.*, and *Gordon Hewart, K.C.* (*W. Frampton* with them), for the appellants. The law is clear that if the County Council in dealing with applications for licences are influenced by extraneous considerations the Court will order a mandamus to issue directing them to hear and determine the matter according to law. The County Council as the licensing authority exercise judicial functions, and must therefore exercise a judicial discretion in granting or refusing licences; and if they are influenced by extraneous considerations they are not acting judicially and according to law. The discretion is to be "according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular": per Lord Halsbury L.C. in *Sharp* v. *Wakefield*. (1)

The County Council were influenced by extraneous considerations. In the first place the point that the alien enemy shareholders were not entitled to vote at a meeting of shareholders of the company was presented to the Council upon the applications for the renewal of the licences. Counsel for the company pressed upon the Council the fact that the company was an English company, that the managers and all the employees were British subjects, that the three German directors had by resolution of the board of directors vacated their office as directors, and that the alien enemy shareholders were not entitled by law to vote and thus exercise any control over the company during the continuance of the war. The Council therefore could not have refused the licences on the ground that the company would be controlled by persons who might have an interest in injuring this country. The Council did not approach the question from that point of view. They must therefore have been actuated by an extraneous consideration, namely, that the majority of the shareholders were alien enemies, and that the dividends on the shares held by alien enemies would be retained for their benefit. In the circumstances of this case the Council ought not to have taken into consideration the fact that there were alien enemy

(1) [1891] A. C. 173, at p. 179.

shareholders in the company and that a large part of the profits would go to them. This was taking into consideration the commercial aspect of the case which was not a relevant matter to consider. The Council were actuated by hostility to the alien enemy shareholders, which was not a relevant consideration. It was never suggested that the theatres might possibly be conducted in a manner hostile to the national interests. It is impossible to know what in fact influenced the Council or the committee to refuse the licences; it is enough to show that extraneous matters were discussed before and considered by them which may have influenced them: *Rex* v. *Shann.* (1) In the next place, if the Council were influenced by the consideration that the alien enemy shareholders were entitled in law to vote by proxy, assuming that they could not come over here, and that they might thus exercise control over the company, they exercised their discretion in refusing the renewal of the licences under a mistaken view of the law, inasmuch as the outbreak of war put an end to any right which the alien enemy shareholders had to vote. Therefore from this point of view they were influenced by an extraneous consideration. The third ground stated in the rule covers both points. A mandamus will issue to them to hear and determine according to law.

Further, with regard to the cinematograph licences the power of the County Council to grant licences for cinematograph exhibitions is conferred by the Cinematograph Act, 1909. (2) The title of the Act is "An Act to make better provision for securing safety at cinematograph and other exhibitions." Sect. 1 accordingly carries out the object stated

(1) [1910] 2K. B. 418, at p. 433.

(2) 9 Edw. 7, c. 30, s. 1: "An exhibition of pictures or other optical effects by means of a cinematograph, or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or, save as otherwise expressly provided by this Act, elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act."

Sect. 2: "(1.) A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine."

C. A. 1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

in the title, and a licence is only required where inflammable films are used. Sect. 2 enables the County Council to impose terms and conditions on the grant of a licence, and it is not contended that those terms and conditions must be strictly limited to securing safety. The terms and conditions may be larger than the regulations imposed by the Secretary of State, but they are still of a limited kind. They must be just and reasonable in relation to the building or the exhibition. The Council can impose conditions as to not opening on Sundays, Good Friday, or Christmas Day: *London County Council* v. *Bermondsey Bioscope Co.* (1) The condition there imposed was only in affirmance of the general law. The case is not an authority for the proposition that a condition can be imposed as to the nationality of the licensee. So also the ground for refusing the licence must be just and reasonable. The mere fact that the majority of the shareholders in an English company are alien enemies is not a just and reasonable ground for refusing a licence to the company. It is an extraneous consideration. The rules ought therefore to be made absolute.

Sir R. B. Finlay, K.C., and *A. H. Bodkin*, for the London County Council, were not called upon.

BUCKLEY L.J. A limited company incorporated in this country applied to the licensing authority, the London County Council, for music and cinematograph licences. The question for determination on this appeal is whether, in considering the applications, the licensing authority were actuated by extraneous considerations, which ought not to have influenced them—whether the shareholding and nationality of shareholders and directors of the company were such.

The jurisdiction of the licensing authority is derived from certain statutes. The statute relating to music licences (the Disorderly Houses Act, 1751) empowers them "to grant such licences as they in their discretion shall think proper"; and that relating to cinematograph licences (the Cinematograph Act, 1909) says that they "may grant licences to such persons as they think fit." Upon this Act of 1909 a question has been

(1) [1911] 1 K. B. 445.

raised as to whether the matters to which the licensing authority are to have regard in considering applications for licences, and the conditions which they may impose on the grant of a licence, are limited to matters and conditions relating to safety in the use of inflammable films. That question falls to be decided upon some words in s. 1 and s. 2, sub-s. 1, of the Act. Sect. 1 provides that an exhibition of this kind for the purposes of which inflammable films are used shall not be given "unless the regulations made by the Secretary of State for securing safety are complied with, or, save as otherwise expressly provided by this Act, elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act." This section contemplates two conditions: one, that there must be a compliance with the regulations of the Secretary of State for securing safety; the other, that the exhibition must not be given elsewhere than in premises licensed for the purpose. Then s. 2, sub-s. 1, empowers the County Council to "grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the Council may by the respective licences determine." It is clear to my mind that the terms and conditions may cover a larger field than that covered by the regulations of the Secretary of the State for securing safety. It seems to me that upon the true construction of the Act the discretion to grant licences to such persons as the licensing authority think fit enables them to go beyond requiring provisions for safety, and to impose other terms and conditions. This was decided by a Divisional Court in 1910 in *London County Council* v. *Bermondsey Bioscope Co.* (1) Therefore the matters which the licensing authority may consider on an application for a licence are not limited to matters relating to safety. The result is that both as regards the music and the cinematograph licences the licensing authority have power to grant licences in the one case "in their discretion" and in the other "to such persons as they think fit." Between these two forms of expression there is, for the present purpose, no material difference.

(1) [1911] 1 K. B. 445.

C. A. 1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

Buckley L.J.

The question is: Have the licensing authority in exercising their statutory powers in this case taken into consideration extraneous considerations which ought not to have influenced their minds, that is to say, as stated in the third ground mentioned in the rule, the nationality of the shareholders and directors of the company? The material facts are these. The company was incorporated in this country, but the subscription to its shares was largely made by persons who are now alien enemies. Taking the figures from the affidavit of Mr. Redfern, the secretary of the company, made in support of the rule, at the time when the war began the fact was that of the 110,000 preference shares forty-four Germans and four German and Austrian banks in London held 99,061 shares, and sixty-six British shareholders and ten shareholders resident in the United Kingdom whose nationality is uncertain held 10,939 shares. Of the 20,000 deferred shares the bulk were owned by alien enemies. In the case of the preference shares, in round numbers, 99,000 shares held by alien enemies have to be contrasted with 11,000 shares held by other persons. As regards the directorate there were six directors. Three of these were Germans, but no great importance is to be attached to this fact, because the three German directors have ceased to be directors, and we may assume that the control, so far as the directorate is concerned, is now in the hands of the three English directors. The matter which weighed with the licensing authority was evidently the number of shares held by alien enemy shareholders and the number of such shareholders. When the applications were made for these licences the licensing authority through their officers caused inquiry to be made into the nationality of the shareholders, and they received statistics which are substantially those I have stated. It is evident from what took place before the licensing authority that the licences were refused, not upon the ground that the theatres had been improperly conducted in any way, but upon the ground that the licensing authority were entitled to regard the proportions in which the shares were held by those who were and by those who were not alien enemies. The question we have to determine is whether they were right in taking that into consideration. If they were wrong, no

doubt a mandamus will lie to order them to hear and determine according to law that which upon that hypothesis they had not heard and determined according to law.

A point has been raised before us which was not, as it seems to me and as it seemed to the Divisional Court, raised either before the committee of the Council, or before the Council, or in the rule. Counsel for the applicants did not put before the committee the proposition that it was immaterial in what proportions the shares were held by alien enemies and by British subjects or persons resident in the United Kingdom; that a state of war having supervened the alien enemy shareholders could not vote; and that, though there is a provision in the articles that shareholders can vote by proxy, the contract under which they can do so had in the case of alien enemy shareholders come to an end owing to the war; and that the proportion of shares was immaterial because the alien enemy shareholders were not entitled to vote. Counsel never raised the question whether the alien enemy shareholders were entitled to vote by proxy. When the applications were before the Council the point raised was, not that the alien enemy shareholders were not entitled to vote, but that, though they could still vote, they could not come here to exercise their right to do so. Nor is the point taken in the rule. The ground stated in the rule is that the London County Council were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders and directors of the company. That is an objection to the Council considering nationality at all. The point as regards right to vote, therefore, is not stated in the rule. Further, I think that the observation of Bray J. was well founded, that "it is clear that no such point was taken before the Council or the Theatres Committee. The arguments, of which we have a shorthand note, proceeded upon the footing that the German shareholders could still vote. Again, when the rule was moved for no such point was raised, and, more important still, it is not stated in the rule as one of the grounds." Upon that ground the Divisional Court thought that the point was not open before them, and in my opinion it is not open before this Court. I may add that, if it were open, it would not, I think, assist the

C. A. 1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

Buckley L.J.

appellants. It would be perfectly proper for the licensing authority to take into their consideration that, even if the alien enemy shareholders could not vote, that is to say, if the contract upon which their right to vote was based was determined by the outbreak of war, they might still have considerable influence in the company by reason of the personal relations between them and the other shareholders. It is for the licensing authority, acting reasonably, to have regard to every relevant consideration which tends to show whether a person to whom they are asked to grant a licence is one in whom, in the circumstances, they have confidence.

What had the licensing authority to consider in this case? I apprehend it was this. It is familiar knowledge that public performances have often a strong influence upon the public mind and public opinion, and for that reason there are useful and salutary provisions for controlling stage performances in theatres. That which is to be brought before the public in the form of a spectacular performance may have an important effect. It may provoke resentment; it may provoke a particular tone of opinion. The Lord Chief Justice was well founded in saying: "If the Council are of opinion that the exhibition of cinematograph films accompanied by music should not be entrusted to a company so largely composed of persons whose interest or whose desire at the present time is or may be to inflict injury upon this country, can it be held as a matter of law that the Council have travelled beyond the limits allowed to them? I think not." The Council had to consider whether they would give a licence to a company, in the name of an agent, which might be controlled or influenced by persons actuated by hostility to this country. If acting bona fide they thought that was a circumstance which ought to guide them in the exercise of their discretion, it was for them and not for us to determine. The only question we have to determine is whether the body with whom exclusively the determination of that matter lies has acted fairly and according to law. Mr. Lidiard, the chairman of the Theatres Committee of the Council, in his affidavit states that the committee in recommending the Council to refuse the licences "came to the conclusion that a company, the directorate and share-

holding of which was constituted as the directorate and shareholding of the London and Provincial Theatres, Limited, was not a suitable company to which or to whose representative in our discretion and opinion a music licence under the authority of the London County Council should be granted. We considered we had a right to inquire into the character from all points of view of any 'person,' whether a company or an individual, who applied for such a licence to the London County Council; and we came to the conclusion that in regard to this company it was not of such a character as we in our discretion thought should have a music licence." Speeches which were delivered on the hearing by members of the Council, stating their views, have been read to us. I do not pay much attention to the views expressed by six members out of the whole Council. We have to see what was the ground on which the Council acted, and whether that ground was open to them. In my opinion the Council were entitled to take into consideration that the company was constituted of shareholders, the large majority of whom were alien enemies, apart altogether from the question whether or not they could vote. They were entitled in their discretion to refuse a licence to a company whose shareholders were in so large a proportion alien enemies.

Upon these grounds the appeal fails and should be dismissed.

PICKFORD L.J. I am of the same opinion. We are not sitting here to inquire whether the London County Council came to a right or a wrong conclusion on this matter. We can only inquire whether they have properly heard and determined the applications, that is to say, whether they have decided upon grounds which they were entitled to take into consideration. It is important that the distinction between what is matter of appeal and what is matter of mandamus should be clearly observed. Some of the arguments which have been addressed to us seem to me to relate more to matters of appeal than to matters of mandamus. It is true that in such a case as this there is no appeal, but that does not destroy the distinction between the two things.

The rule was obtained upon three grounds—the first two

C. A. 1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte*.

Pickford L.J.

grounds are mere general statements and I say nothing about them. The third ground is the relevant one: that the Council were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders and directors in the company. That, to my mind, is limited to the broad question whether the Council had any right to consider nationality at all. I do not think that it goes to the question whether, if they had a right to consider nationality, they considered it from the right point of view. Two arguments have been addressed to us to show that they did not. They seem to be opposed to each other. In the first place, as I understand the argument here and in the Divisional Court, it is that the Council did not consider it from the right point of view, because they looked at it from the point of view that the alien enemy shareholders had a right to vote, and therefore had control of the company. The Divisional Court said, and said rightly, that this point was not stated in the rule as one of the grounds. If it were intended to be taken it should have been stated explicitly because it is a matter which, if put forward, might have been answered on behalf of the Council. In the next place, an argument was addressed to us from the opposite point of view. It is said, looking at the discussion which took place at the Council meeting, that the Council must have considered nationality from the point of view that the shareholders had not the right to vote and therefore had not the control of the company; that, that being so, they could only have acted from some motive of hostility to the alien enemy shareholders or from a desire to put money into British pockets instead of into alien enemies' pockets; and that therefore they regarded nationality from a wrong point of view. This again seems to me a matter which ought to have been inserted in the rule if it was to be made a ground for a mandamus. I see no evidence that the Council acted upon any but a perfectly proper ground. With regard to the speeches of the members which have been referred to, I should imagine that probably hardly any decision of a body like the London County Council dealing with these matters could stand if every statement which a member made in debate were to be taken as a ground of the decision. I should think that there are probably

few debates in which some one does not suggest as a ground for decision something which is not a proper ground; and to say that, because somebody in debate has put forward an improper ground, the decision ought to be set aside as being founded on that particular ground is wrong.

I do not think it is necessary to repeat what has been said by Buckley L.J. as to the right of the Council to consider the nationality of the shareholders of the company. If an alien enemy applied for a licence—possibly an alien enemy could not in any case hold a licence, but I will assume that he legally could—it would be impossible to say that the licensing authority might not properly refuse it on the ground that they did not consider an alien enemy a proper person to hold a licence. An English company is not an alien enemy, and for some purposes it is not possible to look behind the company. But for the purpose of considering whether a licence should be granted to the company it seems to me the licensing authority can, and if it is found that, though the company is English, the majority of the shareholders are alien enemies, the licensing authority are entitled to say that in their opinion the company ought not to have a licence. A reason has been given in the passage which has been read by Buckley L.J. from the judgment of the Lord Chief Justice, and it is also well put by Bray J.: "Alien enemies have a strong motive to injure this country, and there would be a risk of their exercising this influence contrary to the interests of this country. It is said that there must be evidence that such an injury ought to be anticipated"—it is not suggested that the company in the present case intend to do any such thing—"It is impossible that there should be such evidence. There has been no experience which could afford such evidence. Is it not sufficient that in the opinion of the members, or the majority of the members, of the London County Council there is such a risk. They cannot wait and see. The licence is for a year. If there is such a risk, why is the risk to be run?" That passage seems to me to express the ground upon which it is right to consider the composition of a company of this kind when applying for music and cinematograph licences, and the nationality of the bulk of the shareholders.

C. A. 1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

I will only add, though it is not necessary to decide it, that if the Council, in considering a matter proper to be considered, namely, the nationality of the shareholders, made a mistake in fact or in law, as, for example, with regard to the right to vote by proxy, I am not prepared to say that that would be a ground for a mandamus. I agree that the appeal should be dismissed.

BANKES L.J. I am of the same opinion, and have little to add. The point is a short one. There is only one ground specifically stated in the rule, and I cannot see any evidence in support of it. I have not heard during the argument anything which leads me to suppose that there are any grounds existing, not stated in the rule, which, if they had been stated, could have afforded ground for a mandamus. It may possibly be—I do not say it is so—that the Council may have come to an erroneous decision with regard to the law, or have come to an erroneous decision with regard to the facts, but that is not a ground for a mandamus. I have not heard anything which leads me to suppose that any grounds exist on which a mandamus ought to be granted.

Appeal dismissed.

Solicitors for applicants: *Sterns.*
Solicitor for London County Council: *E. Tanner.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1914
Nov. 10, 12.

LONDON AND COUNTIES ASSETS COMPANY, LIMITED *v.* BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

Company—Director—Vacation of Office—Articles of Association—"If he become insolvent."

An article of association of the defendant company provided that "the office of a director shall be vacated:—(*a*) If he become bankrupt or insolvent or compound with his creditors. (*b*) If he become of unsound mind or be found a lunatic."

C., a director of the defendant company, assigned his salary as director to the plaintiffs. In an action by them in the City of London Court to recover the salary for the quarter from November 2, 1912, to February 1, 1913, the defendant company contended that C. was "insolvent" within the meaning of the above article on and before November 2, 1912, and that therefore his office of director had become vacated and no salary was due. At the trial it was proved that from 1908 to the end of 1912 a number of bankruptcy petitions had been presented against him, all of which, however, were dismissed by consent though C. did not pay the petitioning creditors' debts. In his evidence C. admitted that throughout the summer of 1912 he did not pay his debts as they fell due, but he said that, if given time, he would be able to liquidate all his liabilities, and that he had never had any meeting of his creditors nor offered any settlement. He was cross-examined upon a letter written by his solicitor to a creditor and upon an affidavit by him upon an application for the adjournment of a bankruptcy petition with the view of showing an admission of insolvency. The judge came to the conclusion that C. was insolvent within the meaning of article 25 (*a*) during the whole of 1912, and that his office was vacated and the quarter's salary was not due:—

Held, that, in order that a director should be "insolvent" within the meaning of the article, it was not necessary that there should be a definite act of insolvency done on a definite day from which it could be said that the insolvency dated; that there was evidence upon which the judge could find that C. was "insolvent" on November 2, 1912; and that therefore his office of director had become vacated, and no salary was due to him for the quarter.

Reg. v. *Saddlers' Co.* (1863) 10 H. L. C. 404 discussed.

Appeal from the judgment of a Divisional Court on appeal from the City of London Court.

The action was brought in the High Court to recover 50*l.*

C. A. 1914

LONDON AND COUNTIES ASSETS COMPANY, LIMITED v. BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

alleged to be due from the defendants to one James de Lara Cohen, of which debt the plaintiffs were assignees from Cohen. The action was ordered to be tried in the City of London Court.

The defendants were a limited company incorporated on February 2, 1912, under the Companies (Consolidation) Act, 1908. By article 19 of the articles of association James de Lara Cohen was named as a director of the company, and by article 22 each of the directors was to be paid as remuneration for his services a salary at the rate of 100*l.* a year, and the chairman was to be paid an additional sum at the rate of 50*l.* a year. Article 25 was as follows: "The office of a director shall be vacated:—(*a*) If he become bankrupt or insolvent or compound with his creditors. (*b*) If he become of unsound mind or be found a lunatic. (*c*) If he be convicted of an indictable offence. (*d*) If he cease to hold the necessary qualification in shares or stock, or do not obtain the same within one month from the date of his appointment. (*e*) If he absent himself from the meetings of directors for a period of six months without special leave of absence from the other directors. (*f*) If he give the directors one month's notice in writing that he resigns his office.

"But any act done in good faith by a director whose office is vacated as aforesaid shall be valid unless, prior to the doing of such act, written notice shall have been served upon the directors or an entry shall have been made in the directors' minute book stating that such director has ceased to be a director of the company."

Cohen was appointed chairman. The assignment from Cohen to the plaintiffs was dated January 16, 1913. The writ in the action was issued on March 12, 1913, and the 50*l.* claimed was made up of 37*l.* 10*s.* for salary due to Cohen as director and chairman for the quarter ending on February 1, 1913, and the balance for office rent due to him from the defendants. The defence was that Cohen was "insolvent" before August 2, 1912, that he had therefore on that date at latest vacated his office of director, and that the 37*l.* 10*s.* was not due to him; and as to the rest of the claim the defendants claimed to set off against it the sum of 37*l.* 10*s.* which had been paid to Cohen by the

inspector. I think these two sub-sections should be considered separately.

Sub-s. 3 states that the check weigher shall not have authority to do certain things but shall only have authority to do certain others, and provides that the weighing may take place in his absence, unless he had been led to suppose that it would not be proceeded with. It strictly defines his authority as check weigher. So far it contains no prohibition, express or implied, as to his conduct when not acting as check weigher. It does not prohibit him from being absent. When he is absent, the workmen lose the benefit of the protection of their interests. The mine owner does not suffer. But then there comes a proviso limiting the information he may give to the workmen. It may be that this applies to the time when he is off duty as well as to the time when he is on duty, because information might be given at any time. But if this is so, I do not think it affects the construction of the earlier part of the sub-section. It is in the form of a proviso giving him a power to give limited information. It is not in the form of a prohibition. Its object is to prevent a certain construction being put upon the earlier words. I cannot read this sub-section as containing a prohibition forbidding the check weigher from performing other lawful duties in relation to the mine, nor as disqualifying him from being appointed by the workmen under sub-s. 1 of s. 16 of the Act of 1911.

Sub-s. 4 gives the owner of the mine power to appeal to a Court of summary jurisdiction for the removal of the check weigher on certain specified grounds, and this has been held, and rightly held, to apply to the check weigher's conduct when off duty as well as when on duty, because the words used are wide, and there is nothing to limit them to his conduct when on duty. This sub-section does not, in my opinion, alter the construction of sub-s. 3, nor does it contain a prohibition.

It was argued that if the check weigher performed his duty as inspector, he would, or might have to do something which would, under this sub-section, make him liable to be removed. I will consider that. The duties and powers of the persons appointed by the workmen under s. 16 of the Act of 1911 are defined by that section. They are to be allowed to go once at least every

C. A. 1915

DATE v. GAS COAL COLLIERIES, LIMITED.

Bray J.

month, accompanied, if the owner thinks fit, by himself or one or more of the officials, to every part of the mine, and to inspect the shafts, roads, &c., and the machinery, and if there is an accident they are bound to go together with any person acting as legal adviser to the workmen, or with a mining or electrical engineer selected by the workmen, to the place where the accident happened, and to make such inspection as may be necessary for ascertaining the cause of the accident, subject to the provisions of the Act requiring the place where the accident happened to be left as it was immediately after the accident. Their power and duty, so far, is to inspect, and inspect only. That does not seem to me to involve any impeding or interruption of the working of the mine, or interference with the weighing, or with any of the workmen, or with the management of the mine within the meaning of sub-ss. 3 or 4 of s. 13 of the Act of 1887; nor does it entail any giving of information, or the doing of any act to the detriment of the owner, agent or manager of the mine within sub-s. 4. The mere fact that it is necessary for him to go down and come up the mine in order to make his inspection need not impede the working of the mine. He must wait for a convenient opportunity to be taken up and down.

Then under sub-s. 2 of s. 16 of the Act of 1911 facilities are to be offered, but they are to be offered to whomever the men appoint; and lastly, he is to make and sign a full and accurate report of the result of inspection. I can see nothing in his prescribed duties that would make the check weigher do anything which would justify an application to remove him under s. 13, sub-s. 4, unless he were to abuse the powers given to him. It is no more likely, and probably less likely, that a man in the position of a check weigher would abuse his powers than any other workman or person appointed under s. 16 of the Act of 1911.

Counsel for the coal owners referred us to s. 99 of this Act, but that section applies to an inspector appointed under s. 97, and not to a person appointed under s. 16. So much for the Act of 1887.

The next Act to be considered is the Coal Mines (Weighing of Minerals) Act, 1905, which by s. 1 gives power to the workmen to appoint a deputy check weigher to act in the absence of the

check weigher for reasonable cause, and the expression "check weigher" in the Act of 1887, and that Act, is to include any such deputy check weigher during such absence as aforesaid. I do not attach so much importance to that section as was attached to it by the defendants' counsel. If there was a disqualification by s. 13 of the Act of 1887, I do not think the passing of this Act would remove it, although the inconvenience which would otherwise be caused by the absence of the check weigher from his duties would be removed. I do not think it is necessary to construe the words "absence from reasonable cause," but I am inclined to think that if he were absent performing his duties under s. 16 of the Act of 1911, that that would be reasonable cause.

The next Act is the Coal Mines Regulation Act, 1908, commonly called the Eight Hours Act. That Act, by s. 2, sub-s. 2, gave the men power to appoint one or more persons, whether holding the office of check weigher or not, to be at the pit head to observe the times of lowering and raising the men, and the provisions of the Acts of 1887 and 1905 relating to the check weigher were to apply to any person so appointed. It was argued that the express words authorizing the appointment of the check weigher showed that but for these words he could not have been appointed. I think those words were probably inserted to avoid any possible doubt on that point, and perhaps to indicate that the check weigher would be a very proper person to appoint, he having duties close to the pit head. However that may be, I do not think they show any intention to put a construction upon s. 13 of the Act of 1887, much less to alter it.

I am of opinion that the judgment of Bailhache J. was right, and ought to be affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for defendants: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

F. O. R.

K. B. D.
1915
Feb. 15, 22.
C. A.
March 22, 23.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

THE KING *v.* LONDON COUNTY COUNCIL. *Ex parte* LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED.

Theatre — Licence — Music — Cinematograph — Discretion of Licensing Authority—Theatre Company with Alien Enemy Shareholders—Terms and Conditions—Disorderly Houses Act, 1751 (25 *Geo.* 2, *c.* 36), *s.* 2—*Cinematograph Act*, 1909 (9 *Edw.* 7, *c.* 30), *s.* 2.

The terms and conditions which a county council may impose on the grant of a licence under s. 2 of the Cinematograph Act, 1909, are not limited to terms and conditions for securing safety; and therefore the matters to which a county council may have regard in considering an application for a licence under the Act are not confined to matters relating to safety.

London County Council v. *Bermondsey Bioscope Co.* [1911] 1 K. B. 445 approved.

The London County Council, as the licensing authority under the Disorderly Houses Act, 1751, and the Cinematograph Act, 1909, refused to grant the renewal of music and cinematograph licences to a limited company registered in England on the ground that the large majority of its shares were held by alien enemies. A rule having been obtained for a mandamus directed to the Council requiring them to hear and determine the application according to law, upon the ground that they were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders in the company:—

Held by the Court of Appeal, that, apart altogether from the question whether or not the alien enemy shareholders were entitled to vote, the Council could in the exercise of their discretion refuse to grant licences to a company the majority of whose shareholders were alien enemies.

Rules Nisi directed to the London County Council to show cause (1.) why a writ of mandamus should not issue commanding them to hear and determine certain applications by the London and Provincial Electric Theatres, Limited, for the renewal of music licences in respect of three theatres, and (2.) why a writ of mandamus should not issue commanding them to hear similar applications for cinematograph licences in respect of the same theatres.

The facts are fully set out in the judgment of Lord Reading C.J., but shortly stated they are as follows:—The applicants, an

English company formed in 1909, had for several years in succession applied for to, and obtained from, the London County Council, as the licensing authority in such matters, music and cinematograph licences in respect of the theatres in question. In August, 1914, when war broke out between Great Britain and Germany, three of the six directors of the company were of German nationality and resided in Germany, and the greater number of the shares were held by alien enemies. After the outbreak of war no communications passed between the company and the alien enemy shareholders, and a resolution was passed by the board of directors declaring the positions of the three German directors vacant as from August 5, 1914. In November and December, 1914, the company's applications for the renewal of the music and cinematograph licences for the three theatres were refused by the London County Council on the ground that three of the six directors were alien enemies, that most of the shares were held by alien enemies, and that the control of the company was in the hands of alien enemies.

The grounds upon which the rules were moved were (1.) that the London County Council failed to hear and determine the applications according to law; (2.) that they failed to act judicially in determining the applications; and (3.) that they were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders and directors in the applicant company.

Sir R. B. Finlay, K.C., and *Bodkin*, for the London County Council, showed cause. The power to grant music licences is conferred by s. 2 of the Disorderly Houses Act, 1751, which empowers quarter sessions "to grant such licences as they in their discretion shall think proper," but now the jurisdiction to grant those licences is vested in the county council: see the Local Government Act, 1888, s. 3, sub-s. (v.). Cinematograph licences, that is, licences for the exhibition of pictures by means of a cinematograph for the purposes of which inflammable films are used, are granted under the Cinematograph Act, 1909, s. 2, sub-s. 1 of which provides that "A county council may grant licences to such persons as they think fit to use the premises

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine." As to both music and cinematograph licences it is therefore clear that the London County Council have a discretion with reference to the proposed licensees; and the sole question is whether, in exercising their jurisdiction, the London County Council were entitled to take into account the fact that the control of the company applying for the licences was in alien enemies. In dealing with such licences it has been decided that the licensing authority may inquire whether the proposed licensees are fit and proper persons; in other words the licensing authority are entitled to consider the public interest: see *Ex parte Harrington.* (1) They cannot, of course, allow considerations to influence their decision which ought not to have influenced it: *Reg.* v. *West Riding of Yorkshire County Council.* (2) To take the instance given by Cave J. in the *Law Journal* report of that case, they cannot refuse an application on the ground that the applicant has red hair or for some equally apparent irrelevant reason. The Council were, however, entitled to inform their minds as to all relevant facts: see *Rex* v. *Howard* (3); and the fact that the majority of the shares of the applicant company were held by alien enemies was a very material matter for consideration. The possibility, if the licences were granted, of the exhibitions being worked in a way detrimental to the interests of this country, as for example by discouraging recruiting, was a relevant matter for the Council to consider. The fact that the applicants are an English registered company does not put them in any better position than an individual applicant; the Council could refuse a licence to a British-born subject if, for instance, they considered it likely that he would carry on the theatre in a way which was antagonistic to the interests of this country. The Court of Appeal's decision in *Continental Tyre and Rubber Co.* v. *Daimler Co. and Others* (4), that an English company can sue in this country

(1) (1888) 4 Times L. R. 435. (M.C.) 136.
(2) [1896] 2 Q. B. 386; 65 L. J. (3) [1902] 2 K. B. 363.
(4) [1915] 1 K. B. 893.

although practically the whole of its shares are held by alien enemies, does not touch this case. The Court was not there considering any question of discretion, which is the point here.

[LORD READING C.J. From the beginning of the war have not the rights of the German directors and shareholders been suspended?]

The property in their shares is not taken away from the alien enemy shareholders, and the fact that they might possibly send proxies was a matter which the Council might take into their consideration. It was, however, never suggested to the Council, or when the rules were moved, that the control of the company, during the duration of the war, was purely in the English shareholders. It was assumed throughout that the alien enemy shareholders were still effective shareholders and might send proxies.

[LORD READING C.J. You may assume for the present that as this point was not gone into before the Council we cannot consider it.]

The only question, therefore, is whether the Council honestly exercised their discretion. It is submitted that they did. The extent of their discretion in regard to the cinematograph licences is shown by the fact that they can impose a condition that the cinematograph theatre shall not be opened on certain days: see *London County Council* v. *Bermondsey Bioscope Co.* (1); see also *Theatre de Luxe* (*Halifax*) v. *Gledhill* (2) and *Ellis* v. *North Metropolitan Theatres.* (3) [They also cited *Rex* v. *Cork Justices.* (4)]

Sir Edward Carson, K.C., and *W. Frampton*, in support of the rules. At the time the licences were applied for the London County Council had the simple fact before them that the applicants were an English company—a company which was a distinct entity from its shareholders (see *Continental Tyre and Rubber Co.* v. *Daimler Co.* (5)), and a company which, as a matter of law, since the commencement of the war, could not be interfered with or controlled by the alien enemy shareholders. In dealing with applications for licences the Council are bound by

(1) [1911] 1 K. B. 445.
(2) Ante, p. 49.
(3) Ante, p. 61.
(4) [1906] 2 I. R. 415.
(5) [1915] 1 K. B. 893.

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

the same principles as are binding on justices in determining questions which come before them for judicial decision: *Reg.* v. *London County Council.* (1) The Council's discretion must be exercised according to the rules of reason and justice, according to law and not humour: per Lord Halsbury L.C. in *Sharp* v. *Wakefield.* (2) It must be exercised, therefore, not capriciously, arbitrarily, or on extraneous considerations: see *Reg.* v. *Adamson* (3); *Reg.* v. *Bowman* (4); *Reg.* v. *Cotham* (5); *Rex* v. *Shann* (6); *Rex* v. *Hyde Justices.* (7) The mere fact that in an English company the majority of the shares are held by alien enemies is extraneous to the subject-matter of the company's applications. The position might have been different if there had been any evidence before the Council suggesting the likelihood of the exhibition of films which were detrimental to this country's interests, but in the absence of such evidence the matter considered by the Council as justifying their refusal of the licences was altogether extraneous. This is especially clear in reference to the more important of the two kinds of licences applied for, namely, those under the Cinematograph Act, 1909. As the applicants are entitled to show non-inflammable films without any licence, it is clear that the subject for the consideration of the Council is, whether the exhibition can be given with safety to the public. That this is so is also manifest from the language of the title of the Act, which says that it is "An Act to make better provision for securing safety at cinematograph and other exhibitions." In order, therefore, to justify the refusal of a cinematograph licence the Council must be satisfied that something is likely to be done which would lead to an infringement of the Act.

[BRAY J. Under the Cinematograph Act, 1909, the Council are not limited to the consideration of questions affecting the safety of the public. That was expressly decided in *London County Council* v. *Bermondsey Bioscope Co.* (8)]

When it is borne in mind that the company had already been the

(1) [1892] 1 Q. B. 190.
(2) [1891] A. C. 173, at p. 179.
(3) (1875) 1 Q. B. D. 201.
(4) [1898] 1 Q. B. 663.
(5) [1898] 1 Q. B. 802.
(6) [1910] 2 K. B. 418, at p. 435.
(7) [1912] 1 K. B. 645.
(8) [1911] 1 K. B. 445.

grantees of similar licences and were asking for their renewal, the question for the Council was whether anything had happened which would lead them to anticipate that the applicants would not be, as they had been in the past, fit and proper persons to hold the licences. They were the same persons; they are an English company against whom no charge has ever been made.

Cur. adv. vult.

Feb. 22. The following judgments were read :—

LORD READING C.J. The London County Council refused to grant to the London and Provincial Electric Theatres, Limited, the renewal of licences for the exhibition of inflammable cinematograph films and for the performance of music at three theatres within their jurisdiction for these purposes. The ground of the refusal was that three of the six directors of the company were alien enemies, that most of the shares in the company were held by alien enemies, and that the control of the company was in the hands of alien enemies. The company contends: (1.) That the Council failed to hear and determine the applications according to law; (2.) that they failed to act judicially in determining the applications; and (3.) that the Council were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders and directors in the company. Upon these grounds the company seeks to obtain from this Court a writ of mandamus directed to the London County Council commanding them to hear and determine the applications for the licences according to law. The Court granted a rule upon the application of the company, and the London County Council appeared to show cause why the writ of mandamus should not issue.

The jurisdiction of the London County Council with regard to the exhibition of inflammable cinematograph films is derived from the Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 2, sub-s. 1, which provides that "A county council may grant licences to such persons as they think fit to use the premises specified in the licence" for this purpose and on such terms and conditions and under such restrictions as the council may

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte*.

Lord Reading C.J.

determine. The jurisdiction to grant music licences is derived from the Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 2, and the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3, whereby the London County Council were "authorised and empowered to grant such licences as they in their discretion shall think proper." The granting of the licences either for exhibitions of cinematograph films or for the performance of music is therefore in the discretion of the Council. The question for the consideration of the Council, subject to a point hereinafter mentioned upon the Cinematograph Act, was whether, acting with due regard to the public interest, the renewal of the licences should be granted to the secretary of the company on behalf of the company.

The material facts are as follows:—The London and Provincial Electric Theatres, Limited, is an English company formed in December, 1909. Invitations were issued to the public to subscribe the necessary capital. The response was insufficient, and eventually three persons of German nationality residing at Mannheim, in the empire of Germany, subscribed more than half the number of shares issued, and thus obtained the control of the company. After the capital had been subscribed several theatres for the exhibition of cinematograph films were constructed in accordance with plans approved by the Council, and, it is said, at an expenditure of 100,000*l*. Both cinematograph and music licences were obtained from the Council in respect of the above-mentioned three theatres of the company, and were in the ordinary course renewed in successive years. At the date of the last applications for the renewal of the licences this country was at war with Germany. Apart from considerations arising from the war it is not contended that there was any ground for refusing the applications. No complaint was made as to the conduct of the theatres by the company, neither was it suggested that there had been any breach of the terms and conditions prescribed by the licences. On October 20, 1914, the secretary of the company, a natural-born British subject, who was the licensee on behalf of the company, applied for a renewal of the music licences for the three theatres, and subsequently, in answer to a written request by the Council, supplied a list of all the persons employed, with

their names and addresses and particulars of their nationality, and a certificate showing that the licensee and the staff at the theatres were natural-born British subjects. On November 11 notice was received by the company to attend the next day before the Theatres Committee of the Council as questions might arise with reference to the nationality of the directorate and shareholders of the company. The company appeared by counsel before the committee, and evidence was given which established, inter alia: (1.) That at the declaration of war three of the six directors of the company were of German nationality and resided in Germany and the other three directors were natural-born British subjects. (2.) That the company had been advised that the alien enemy directors on the declaration of war ceased by operation of law to be directors of the company until peace had been restored. (3) That at the date of the applications to the Council 110,000 preference shares of 10*s*. each had been issued by the company and 20,000 deferred shares. Of the preference shares 92,600 had been issued to and were then held by forty-nine shareholders who were and are resident in Germany and are alien enemies and 17,400 to seventy-six persons resident in the United Kingdom. (1) Of the deferred shares the majority were then held by alien enemies. The preferred shares have received dividends from the year 1910 to 1913 inclusive. No dividend has ever been paid in respect of the deferred shares. By the articles of association of the company every member is entitled on a poll either in person or by proxy to one vote for every share held by him. At a general meeting of the shareholders every member present in person is entitled to one vote only. (4.) That about 200 persons were employed by the company at all their theatres. None of such persons was of enemy nationality; one man, an Austrian, had been employed at the head office, but he was discharged immediately the regulations under the Aliens Restriction Act, 1914, were issued.

It was contended that during the war the alien enemy directors

(1) This statement appears to be taken from the evidence before the committee. It will be observed that there is some discrepancy between the figures and those given by Buckley, L.J., in his judgment, post, p. 486, but it is not considered that this discrepancy is material.

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte*.

Lord Reading C.J.

ceased to act as directors and that the alien enemy shareholders could neither receive any dividend nor otherwise obtain money for their shares, and that considerations based upon the enemy character of part of the directorate and of the shareholders holding the majority of the shares had no bearing upon the merits of the applications. The committee retired to consider their decision, and upon returning announced that they should not recommend the Council to grant the renewal of the music licences. On November 27 the applications for the renewals came in the ordinary course of such matters before the Council. The facts and considerations above stated were fully presented by counsel for the company. Great stress was laid by him upon the hardship and injustice which, according to his contention, would be inflicted upon the English shareholders and upon the persons employed by the company in the event of a refusal by the Council. Attention was directed to the law forbidding the payment of dividends or any moneys to alien enemies and to the provisions of the Trading with the Enemy Amendment Act, 1914. Questions were asked by members of the Council and speeches were made, some in favour of, others against, the granting of the applications. Eventually the Council refused to renew the licences, forty-one members voting for the refusal and thirty-one against it.

On December 16, 1914, the assistant manager of the company appeared before the Theatres Committee of the Council to apply for the renewal of the licences for the exhibition of inflammable films at the three theatres. The facts and arguments were substantially the same as those presented to the committee upon the applications for the music licences. The committee decided also to refuse to grant the renewal of these licences.

Upon these facts it is first contended that the London County Council had acted, to quote the language of the affidavit of Mr. Redfern, the secretary of the company, "on a preconceived intention to refuse to renew the licences on the ground of the nationality of some of the company's shareholders." I understand this to mean that the Council before proceeding to hear and determine the applications had already decided or arranged to refuse them. It is unnecessary to discuss this contention at

any length, because in my judgment there is not a tittle of evidence in support of it. Further, I am quite satisfied that there was in fact no such understanding or arrangement.

The second and more serious contention is that the Council have not exercised their discretion in a judicial spirit in the sense that they have allowed extraneous considerations to affect their decisions. If they have allowed themselves to take into consideration matters which had no bearing upon the merits of the case before them, but which nevertheless influenced their minds in arriving at their decision, they have not exercised their discretion properly and have not heard and determined the case according to law: see *Reg.* v. *Bowman*. (1) The discretion vested in the Council must be exercised within regular limits; in particular, regard should be had only to the merits of the matter before the Council. Although the Council does not sit as a Court of law, they must exercise their discretion in a judicial spirit: see *Sharp* v. *Wakefield*. (2) The difficulty lies in the application of these principles to the present case. The Council came to the conclusion that a company whose directorate and shareholding were constituted as the directorate and shareholding of the London and Provincial Electric Theatres, Limited, was not a suitable company to which or to whose representative in their discretion and opinion licences should be granted. It must be borne in mind that this Court, in determining whether or not the mandamus should issue, is not exercising appellate jurisdiction. We are not entitled to decide according to the view we should have taken in the first instance had the matter come before us. We should only order the mandamus to issue if we came to the conclusion that the Council, by taking into consideration the enemy character of the constitution of the company, had allowed their minds to be influenced by extraneous considerations. The Council in these matters are the guardians of the public interest and welfare. If the Council are of opinion that the exhibition of cinematograph films accompanied by music should not be entrusted to a company so largely composed of persons whose interest or whose desire at the present time is

(1) [1898] 1 Q. B. at p. 666, per Wills J.

(2) [1891] A. C. at p. 179, per Lord Halsbury.

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

Lord Reading C.J.

or may be to inflict injury upon this country, can it be held as a matter of law that the Council have travelled beyond the limits allowed to them? I think not. I cannot hold that such considerations are extraneous or extra-judicial. These exhibitions exercise a powerful influence, often too powerful an influence, upon the minds of the young; sometimes also upon the minds of others. I cannot think that a Court of law would be justified in treating such considerations as beyond the limits to which a man could look who was desirous of discharging his duty honestly to the best of his ability and with his mind directed solely to the public interest of the realm at a critical period of its history. At such a time suspicion as to the possible action or influence, direct or indirect, of enemies is naturally very rife, and an honest man might well think it wise to run no risk and to take precautions to guard against even the remote possibility of injury being caused to this country's interests which to others might appear wholly unnecessary and even unwise, perhaps unjust. If the majority of the members of the Council came to the conclusion that it was not suitable that such a company should at such a time be licensed to carry on such exhibitions, it cannot, in my opinion, be said to be an arbitrary exercise of discretion or to be based upon extraneous considerations.

The case of *Continental Tyre and Rubber Co.* v. *Daimler Co.* (1), recently decided by the full Court of Appeal, has been to some extent relied upon in support of the company's contention. That decision has only a remote bearing, if any, upon the present case. In that case the Court held that a company formed under our laws and carrying on business in this country could recover a debt due to the company notwithstanding that its directors and shareholders were alien enemies, on the ground that the entity alone could be regarded and that in no circumstances could the debt be treated as a debt to the individual shareholders. The Court was pronouncing upon the legal right of the company to sue and enforce its claims for payment of a debt. No question of the exercise of discretion by the Court arose or could arise in such a case.

With regard to the applications for the cinematograph

(1) [1915] 1 K. B. 893.

licences, which are indeed the more important applications in this case, as the music licences would be of very little value to the company without the cinematograph licences, it was urged by Sir Edward Carson that under the Cinematograph Act, 1909, the powers vested in the Council are restricted to making provisions and imposing conditions for securing the safety of the public and other persons at the exhibition of inflammable films, and that therefore the Council could not take into consideration the enemy character of the directorate or shareholding of the company. It was pointed out by him that the jurisdiction of the Council is confined to the granting of licences for the exhibition of inflammable films and does not extend to the exhibition of non-inflammable films, and he argued that the statute was passed to protect the public against the risk of fire or other risks of a similar character when visiting the exhibition. It is not open to us in this Court to consider this argument, inasmuch as it has already been decided in *London County Council* v. *Bermondsey Bioscope Co.* (1) that the powers given to the Council are not confined to securing the safety of the public, but extend to imposing conditions such as that the premises shall not be open on Sundays, Good Friday, or Christmas Day. It is important to observe that the case on behalf of the London and Provincial Electric Theatres was presented to the Council and argued before them upon the basis that the enemy shareholders might possibly, in certain events, exercise control over the affairs of the company during the war. It seems to have been assumed throughout that the control of the company remained with the alien enemy shareholders notwithstanding the war, and that they could in the event of a poll exercise their right of voting by means of proxies, which, I suppose, would be forwarded indirectly through neutral countries. We came to the conclusion that, having regard to the presentment of the case to the Council, we could not now consider whether the control of the company was not since the war wholly in the hands of the shareholders in the United Kingdom on the ground that such proxies would have been null and void. It might have been urged that the appointment of a person in this country to act

(1) [1911] 1 K. B. 445.

1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

Lord Reading C.J.

here as agent for an alien enemy would be an infringement of the law relating to trading with the enemy, and would constitute a commercial intercourse or transaction between subjects of this country and the enemy country which is prohibited at common law and also by statute. In consequence of the course taken before the committee of the Council we refused to consider this point on the application for the mandamus, as we were of opinion that whatever our decision as to the validity of proxies might be it could not in the circumstances affect our decision in this case as the point had never been even mentioned to the Council. I desire, however, to guard against the possible assumption that this Court has decided that even if the control of the company had been in the hands only of the British shareholders, and that even if in law the voting powers of the alien enemy shareholders could not be exercised during the war, no mandamus could issue to the Council if they had based their decision upon the control of the company being in its alien enemy shareholders. The point is not open in this case for the reasons I have given, but I desire to leave it open. I wish, however, to add that certainly I should require argument to convince me that a proxy issued by an alien enemy during the war to a British subject to vote in this country for the alien enemy is not against the law and therefore null and void.

In my opinion both rules should be discharged with costs.

BRAY J. In this case the applicants, the London and Provincial Electric Theatres, Limited, sought to make absolute a rule for a mandamus directed to the London County Council commanding them to hear and determine their application for the renewal of cinematograph licences in respect of three theatres, and a similar rule in respect of the renewal of music licences in respect of the same theatres. The grounds alleged were: (1.) That the London County Council had failed to hear and determine the applications according to law; (2.) that they failed to act judicially in determining the applications; and (3.) that the London County Council were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders and directors in the applicant company.

It is unnecessary for me to state the facts; they have been fully stated in my Lord's judgment.

I will take the case of the cinematograph licences first. The London County Council are authorized to grant and renew these licences by s. 2, sub-s. 1, of the Cinematograph Act, 1909, which is in these terms: "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to the regulations of the Secretary of State, the council may by the respective licences determine." It has been decided by this Court in *London County Council* v. *Bermondsey Bioscope Co.* (1) that the terms and conditions on which licences may be granted are not confined to conditions relating to safety. This decision has been confirmed in two subsequent cases before this Court, and is clearly binding on us if we differed from it, which I certainly do not. It follows, I think, from that that when the London County Council are considering as to the fitness of persons to whom licences are to be given they are not confined to considerations of safety alone. The persons must be such as they think fit, that is, fit to hold licences for giving cinematograph exhibitions. The London County Council are not a judicial body but an administrative body, but in exercising the authority conferred upon them they must exercise it fairly and impartially and must act according to the rules of reason and justice: see *Royal Aquarium* v. *Parkinson.* (2) In considering the fitness of the persons the Council must not be guided by extraneous considerations. It is clear that in this case the Council were guided by the consideration that the large majority of the shareholders were alien enemies, and the question for us is whether this was an extraneous consideration. It seems to me to be clearly permissible for the Council to consider when a company is the applicant who are the persons who control the company. If it clearly appeared that such persons were not fit persons to have the licences the licences ought not to be granted. Next, is it permissible to consider whether such persons are alien enemies? These exhibitions have a strong influence on the minds of the

(1) [1911] 1 K. B. 445. (2) [1892] 1 Q. B. 431; see p. 445.

1915

REX
v.
LONDON
COUNTY
COUNCIL.

LONDON AND
PROVINCIAL
ELECTRIC
THEATRES,
LIMITED,
Ex parte.

Bray J.

spectators—in some cases a bad influence. Alien enemies have a strong motive to injure this country, and there would be a risk of their exercising this influence contrary to the interests of this country. It is said that there must be evidence that such an injury ought to be anticipated. It is impossible that there should be such evidence. There has been no experience which could afford such evidence. Is it not sufficient that in the opinion of the members, or the majority of the members, of the London County Council there is such a risk? They cannot wait and see. The licence is for a year. If there is such a risk, why is the risk to be run? It seems to me to be entirely a matter for the Council in their discretion to say whether or not it is desirable in the interest of the public that licences should be granted to a company controlled by alien enemies. It is not, in my opinion, an extraneous consideration. The Legislature has thought fit to leave it to the Council to say whether the applicants are fit persons, and we cannot direct them to hear and determine the matter because we might think—and I am far from saying I do so think—that these were fit persons.

But it was argued before us that being alien enemies the shareholders can no longer exercise their right of voting and cannot therefore, during the war, control the company. It is clear that no such point was taken before the Council or the Theatres Committee. The arguments, of which we have a shorthand note, proceeded upon the footing that the German shareholders could still vote. Again, when the rule was moved for no such point was raised, and, more important still, it is not stated in the rule as one of the grounds. The second ground does not in my opinion raise it, nor was it intended that it should. I do not think it is open to the applicants to raise it now. This is sufficient to decide the case against the applicants, because in my opinion there is not the slightest ground for saying that the members of the Council had acted on a preconceived intention to refuse the licences, and on these grounds I am of opinion that the rule should be discharged. I desire to express no opinion as to whether alien enemies can exercise their right to vote by proxy or otherwise, or as to whether, if they cannot, it follows from that that they can have no control, nor do I desire

to express an opinion upon the point whether, if the Council wrongly decided either in law or fact that the company was under the control of the German shareholders, this Court could order the Council to hear and determine the application afresh.

On the same grounds I am of opinion that the rule with regard to the licences for music should also be discharged.

SHEARMAN J. I am of the same opinion. According to the authorities which have been referred to the County Council had the same discretion upon both applications to consider who were fit and proper persons to obtain these licences and in arriving at their decision to consider the public interest. These two rules were obtained mainly upon the allegation that in considering the fact that the majority of the shareholders of the applicant company were alien enemies the Council were considering extraneous matter and that their decision was based upon this fact. The answer of those seeking to discharge the rule is that, as the majority of the shareholders are likely to have a voice in the direction of the entertainment offered to the public, the fact in question is not extraneous. The discussion before the County Council rested upon the uncontested basis that the alien enemies who were shareholders could exercise at the present moment their ordinary rights as shareholders. It is now argued that this basis is wrong in law and that at the present moment the rights of the shareholders who are alien enemies are entirely suspended, and therefore, for the present, non-existent. This argument was first raised in the course of the discussion of the motions to discharge the rules. In my judgment it is too late to raise this contention now and to ask the Court to decide upon these applications some novel and difficult points of law. It seems to me that such a procedure would render the due administration of the licensing law very difficult. Upon the basis of what was treated as being the law when the applications were made to the London County Council it would, in my judgment, for the reasons given in the other judgments, be wrong to say that they considered and based their decision upon extraneous matter, and therefore both rules must be discharged.

Rules discharged.

J. S. H.

C. A. 1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

The London and Provincial Electric Theatres, Limited, appealed.

March 22, 23. *G. Elliott, K.C.*, and *Gordon Hewart, K.C.* (*W. Frampton* with them), for the appellants. The law is clear that if the County Council in dealing with applications for licences are influenced by extraneous considerations the Court will order a mandamus to issue directing them to hear and determine the matter according to law. The County Council as the licensing authority exercise judicial functions, and must therefore exercise a judicial discretion in granting or refusing licences; and if they are influenced by extraneous considerations they are not acting judicially and according to law. The discretion is to be "according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular": per Lord Halsbury L.C. in *Sharp* v. *Wakefield.* (1)

The County Council were influenced by extraneous considerations. In the first place the point that the alien enemy shareholders were not entitled to vote at a meeting of shareholders of the company was presented to the Council upon the applications for the renewal of the licences. Counsel for the company pressed upon the Council the fact that the company was an English company, that the managers and all the employees were British subjects, that the three German directors had by resolution of the board of directors vacated their office as directors, and that the alien enemy shareholders were not entitled by law to vote and thus exercise any control over the company during the continuance of the war. The Council therefore could not have refused the licences on the ground that the company would be controlled by persons who might have an interest in injuring this country. The Council did not approach the question from that point of view. They must therefore have been actuated by an extraneous consideration, namely, that the majority of the shareholders were alien enemies, and that the dividends on the shares held by alien enemies would be retained for their benefit. In the circumstances of this case the Council ought not to have taken into consideration the fact that there were alien enemy

(1) [1891] A. C. 173, at p. 179.

shareholders in the company and that a large part of the profits would go to them. This was taking into consideration the commercial aspect of the case which was not a relevant matter to consider. The Council were actuated by hostility to the alien enemy shareholders, which was not a relevant consideration. It was never suggested that the theatres might possibly be conducted in a manner hostile to the national interests. It is impossible to know what in fact influenced the Council or the committee to refuse the licences; it is enough to show that extraneous matters were discussed before and considered by them which may have influenced them: *Rex* v. *Shann.* (1) In the next place, if the Council were influenced by the consideration that the alien enemy shareholders were entitled in law to vote by proxy, assuming that they could not come over here, and that they might thus exercise control over the company, they exercised their discretion in refusing the renewal of the licences under a mistaken view of the law, inasmuch as the outbreak of war put an end to any right which the alien enemy shareholders had to vote. Therefore from this point of view they were influenced by an extraneous consideration. The third ground stated in the rule covers both points. A mandamus will issue to them to hear and determine according to law.

Further, with regard to the cinematograph licences the power of the County Council to grant licences for cinematograph exhibitions is conferred by the Cinematograph Act, 1909. (2) The title of the Act is "An Act to make better provision for securing safety at cinematograph and other exhibitions." Sect. 1 accordingly carries out the object stated

(1) [1910] 2K. B. 418, at p. 433.

(2) 9 Edw. 7, c. 30, s. 1: "An exhibition of pictures or other optical effects by means of a cinematograph, or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or, save as otherwise expressly provided by this Act, elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act."

Sect. 2: "(1.) A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine."

C. A. 1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

in the title, and a licence is only required where inflammable films are used. Sect. 2 enables the County Council to impose terms and conditions on the grant of a licence, and it is not contended that those terms and conditions must be strictly limited to securing safety. The terms and conditions may be larger than the regulations imposed by the Secretary of State, but they are still of a limited kind. They must be just and reasonable in relation to the building or the exhibition. The Council can impose conditions as to not opening on Sundays, Good Friday, or Christmas Day: *London County Council* v. *Bermondsey Bioscope Co.* (1) The condition there imposed was only in affirmance of the general law. The case is not an authority for the proposition that a condition can be imposed as to the nationality of the licensee. So also the ground for refusing the licence must be just and reasonable. The mere fact that the majority of the shareholders in an English company are alien enemies is not a just and reasonable ground for refusing a licence to the company. It is an extraneous consideration. The rules ought therefore to be made absolute.

Sir R. B. Finlay, K.C., and *A. H. Bodkin*, for the London County Council, were not called upon.

BUCKLEY L.J. A limited company incorporated in this country applied to the licensing authority, the London County Council, for music and cinematograph licences. The question for determination on this appeal is whether, in considering the applications, the licensing authority were actuated by extraneous considerations, which ought not to have influenced them—whether the shareholding and nationality of shareholders and directors of the company were such.

The jurisdiction of the licensing authority is derived from certain statutes. The statute relating to music licences (the Disorderly Houses Act, 1751) empowers them "to grant such licences as they in their discretion shall think proper"; and that relating to cinematograph licences (the Cinematograph Act, 1909) says that they "may grant licences to such persons as they think fit." Upon this Act of 1909 a question has been

(1) [1911] 1 K. B. 445.

raised as to whether the matters to which the licensing authority are to have regard in considering applications for licences, and the conditions which they may impose on the grant of a licence, are limited to matters and conditions relating to safety in the use of inflammable films. That question falls to be decided upon some words in s. 1 and s. 2, sub-s. 1, of the Act. Sect. 1 provides that an exhibition of this kind for the purposes of which inflammable films are used shall not be given "unless the regulations made by the Secretary of State for securing safety are complied with, or, save as otherwise expressly provided by this Act, elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act." This section contemplates two conditions: one, that there must be a compliance with the regulations of the Secretary of State for securing safety; the other, that the exhibition must not be given elsewhere than in premises licensed for the purpose. Then s. 2, sub-s. 1, empowers the County Council to "grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the Council may by the respective licences determine." It is clear to my mind that the terms and conditions may cover a larger field than that covered by the regulations of the Secretary of the State for securing safety. It seems to me that upon the true construction of the Act the discretion to grant licences to such persons as the licensing authority think fit enables them to go beyond requiring provisions for safety, and to impose other terms and conditions. This was decided by a Divisional Court in 1910 in *London County Council* v. *Bermondsey Bioscope Co.* (1) Therefore the matters which the licensing authority may consider on an application for a licence are not limited to matters relating to safety. The result is that both as regards the music and the cinematograph licences the licensing authority have power to grant licences in the one case "in their discretion" and in the other "to such persons as they think fit." Between these two forms of expression there is, for the present purpose, no material difference.

(1) [1911] 1 K. B. 445.

C. A. 1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

Buckley L.J.

The question is: Have the licensing authority in exercising their statutory powers in this case taken into consideration extraneous considerations which ought not to have influenced their minds, that is to say, as stated in the third ground mentioned in the rule, the nationality of the shareholders and directors of the company? The material facts are these. The company was incorporated in this country, but the subscription to its shares was largely made by persons who are now alien enemies. Taking the figures from the affidavit of Mr. Redfern, the secretary of the company, made in support of the rule, at the time when the war began the fact was that of the 110,000 preference shares forty-four Germans and four German and Austrian banks in London held 99,061 shares, and sixty-six British shareholders and ten shareholders resident in the United Kingdom whose nationality is uncertain held 10,939 shares. Of the 20,000 deferred shares the bulk were owned by alien enemies. In the case of the preference shares, in round numbers, 99,000 shares held by alien enemies have to be contrasted with 11,000 shares held by other persons. As regards the directorate there were six directors. Three of these were Germans, but no great importance is to be attached to this fact, because the three German directors have ceased to be directors, and we may assume that the control, so far as the directorate is concerned, is now in the hands of the three English directors. The matter which weighed with the licensing authority was evidently the number of shares held by alien enemy shareholders and the number of such shareholders. When the applications were made for these licences the licensing authority through their officers caused inquiry to be made into the nationality of the shareholders, and they received statistics which are substantially those I have stated. It is evident from what took place before the licensing authority that the licences were refused, not upon the ground that the theatres had been improperly conducted in any way, but upon the ground that the licensing authority were entitled to regard the proportions in which the shares were held by those who were and by those who were not alien enemies. The question we have to determine is whether they were right in taking that into consideration. If they were wrong, no

doubt a mandamus will lie to order them to hear and determine according to law that which upon that hypothesis they had not heard and determined according to law.

A point has been raised before us which was not, as it seems to me and as it seemed to the Divisional Court, raised either before the committee of the Council, or before the Council, or in the rule. Counsel for the applicants did not put before the committee the proposition that it was immaterial in what proportions the shares were held by alien enemies and by British subjects or persons resident in the United Kingdom; that a state of war having supervened the alien enemy shareholders could not vote; and that, though there is a provision in the articles that shareholders can vote by proxy, the contract under which they can do so had in the case of alien enemy shareholders come to an end owing to the war; and that the proportion of shares was immaterial because the alien enemy shareholders were not entitled to vote. Counsel never raised the question whether the alien enemy shareholders were entitled to vote by proxy. When the applications were before the Council the point raised was, not that the alien enemy shareholders were not entitled to vote, but that, though they could still vote, they could not come here to exercise their right to do so. Nor is the point taken in the rule. The ground stated in the rule is that the London County Council were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders and directors of the company. That is an objection to the Council considering nationality at all. The point as regards right to vote, therefore, is not stated in the rule. Further, I think that the observation of Bray J. was well founded, that "it is clear that no such point was taken before the Council or the Theatres Committee. The arguments, of which we have a shorthand note, proceeded upon the footing that the German shareholders could still vote. Again, when the rule was moved for no such point was raised, and, more important still, it is not stated in the rule as one of the grounds." Upon that ground the Divisional Court thought that the point was not open before them, and in my opinion it is not open before this Court. I may add that, if it were open, it would not, I think, assist the

C. A.
1915

REX
v.
LONDON
COUNTY
COUNCIL.
LONDON AND
PROVINCIAL
ELECTRIC
THEATRES,
LIMITED,
Ex parte.

Buckley L.J.

appellants. It would be perfectly proper for the licensing authority to take into their consideration that, even if the alien enemy shareholders could not vote, that is to say, if the contract upon which their right to vote was based was determined by the outbreak of war, they might still have considerable influence in the company by reason of the personal relations between them and the other shareholders. It is for the licensing authority, acting reasonably, to have regard to every relevant consideration which tends to show whether a person to whom they are asked to grant a licence is one in whom, in the circumstances, they have confidence.

What had the licensing authority to consider in this case? I apprehend it was this. It is familiar knowledge that public performances have often a strong influence upon the public mind and public opinion, and for that reason there are useful and salutary provisions for controlling stage performances in theatres. That which is to be brought before the public in the form of a spectacular performance may have an important effect. It may provoke resentment; it may provoke a particular tone of opinion. The Lord Chief Justice was well founded in saying: "If the Council are of opinion that the exhibition of cinematograph films accompanied by music should not be entrusted to a company so largely composed of persons whose interest or whose desire at the present time is or may be to inflict injury upon this country, can it be held as a matter of law that the Council have travelled beyond the limits allowed to them? I think not." The Council had to consider whether they would give a licence to a company, in the name of an agent, which might be controlled or influenced by persons actuated by hostility to this country. If acting bona fide they thought that was a circumstance which ought to guide them in the exercise of their discretion, it was for them and not for us to determine. The only question we have to determine is whether the body with whom exclusively the determination of that matter lies has acted fairly and according to law. Mr. Lidiard, the chairman of the Theatres Committee of the Council, in his affidavit states that the committee in recommending the Council to refuse the licences "came to the conclusion that a company, the directorate and share-

holding of which was constituted as the directorate and shareholding of the London and Provincial Theatres, Limited, was not a suitable company to which or to whose representative in our discretion and opinion a music licence under the authority of the London County Council should be granted. We considered we had a right to inquire into the character from all points of view of any 'person,' whether a company or an individual, who applied for such a licence to the London County Council; and we came to the conclusion that in regard to this company it was not of such a character as we in our discretion thought should have a music licence." Speeches which were delivered on the hearing by members of the Council, stating their views, have been read to us. I do not pay much attention to the views expressed by six members out of the whole Council. We have to see what was the ground on which the Council acted, and whether that ground was open to them. In my opinion the Council were entitled to take into consideration that the company was constituted of shareholders, the large majority of whom were alien enemies, apart altogether from the question whether or not they could vote. They were entitled in their discretion to refuse a licence to a company whose shareholders were in so large a proportion alien enemies.

Upon these grounds the appeal fails and should be dismissed.

PICKFORD L.J. I am of the same opinion. We are not sitting here to inquire whether the London County Council came to a right or a wrong conclusion on this matter. We can only inquire whether they have properly heard and determined the applications, that is to say, whether they have decided upon grounds which they were entitled to take into consideration. It is important that the distinction between what is matter of appeal and what is matter of mandamus should be clearly observed. Some of the arguments which have been addressed to us seem to me to relate more to matters of appeal than to matters of mandamus. It is true that in such a case as this there is no appeal, but that does not destroy the distinction between the two things.

The rule was obtained upon three grounds—the first two

C. A. 1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte*.

Pickford L.J.

grounds are mere general statements and I say nothing about them. The third ground is the relevant one: that the Council were actuated by extraneous considerations, namely, the shareholding and nationality of shareholders and directors in the company. That, to my mind, is limited to the broad question whether the Council had any right to consider nationality at all. I do not think that it goes to the question whether, if they had a right to consider nationality, they considered it from the right point of view. Two arguments have been addressed to us to show that they did not. They seem to be opposed to each other. In the first place, as I understand the argument here and in the Divisional Court, it is that the Council did not consider it from the right point of view, because they looked at it from the point of view that the alien enemy shareholders had a right to vote, and therefore had control of the company. The Divisional Court said, and said rightly, that this point was not stated in the rule as one of the grounds. If it were intended to be taken it should have been stated explicitly because it is a matter which, if put forward, might have been answered on behalf of the Council. In the next place, an argument was addressed to us from the opposite point of view. It is said, looking at the discussion which took place at the Council meeting, that the Council must have considered nationality from the point of view that the shareholders had not the right to vote and therefore had not the control of the company; that, that being so, they could only have acted from some motive of hostility to the alien enemy shareholders or from a desire to put money into British pockets instead of into alien enemies' pockets; and that therefore they regarded nationality from a wrong point of view. This again seems to me a matter which ought to have been inserted in the rule if it was to be made a ground for a mandamus. I see no evidence that the Council acted upon any but a perfectly proper ground. With regard to the speeches of the members which have been referred to, I should imagine that probably hardly any decision of a body like the London County Council dealing with these matters could stand if every statement which a member made in debate were to be taken as a ground of the decision. I should think that there are probably

few debates in which some one does not suggest as a ground for decision something which is not a proper ground; and to say that, because somebody in debate has put forward an improper ground, the decision ought to be set aside as being founded on that particular ground is wrong.

I do not think it is necessary to repeat what has been said by Buckley L.J. as to the right of the Council to consider the nationality of the shareholders of the company. If an alien enemy applied for a licence—possibly an alien enemy could not in any case hold a licence, but I will assume that he legally could—it would be impossible to say that the licensing authority might not properly refuse it on the ground that they did not consider an alien enemy a proper person to hold a licence. An English company is not an alien enemy, and for some purposes it is not possible to look behind the company. But for the purpose of considering whether a licence should be granted to the company it seems to me the licensing authority can, and if it is found that, though the company is English, the majority of the shareholders are alien enemies, the licensing authority are entitled to say that in their opinion the company ought not to have a licence. A reason has been given in the passage which has been read by Buckley L.J. from the judgment of the Lord Chief Justice, and it is also well put by Bray J.: "Alien enemies have a strong motive to injure this country, and there would be a risk of their exercising this influence contrary to the interests of this country. It is said that there must be evidence that such an injury ought to be anticipated"—it is not suggested that the company in the present case intend to do any such thing—"It is impossible that there should be such evidence. There has been no experience which could afford such evidence. Is it not sufficient that in the opinion of the members, or the majority of the members, of the London County Council there is such a risk. They cannot wait and see. The licence is for a year. If there is such a risk, why is the risk to be run?" That passage seems to me to express the ground upon which it is right to consider the composition of a company of this kind when applying for music and cinematograph licences, and the nationality of the bulk of the shareholders.

C. A. 1915

REX v. LONDON COUNTY COUNCIL. LONDON AND PROVINCIAL ELECTRIC THEATRES, LIMITED, *Ex parte.*

I will only add, though it is not necessary to decide it, that if the Council, in considering a matter proper to be considered, namely, the nationality of the shareholders, made a mistake in fact or in law, as, for example, with regard to the right to vote by proxy, I am not prepared to say that that would be a ground for a mandamus. I agree that the appeal should be dismissed.

BANKES L.J. I am of the same opinion, and have little to add. The point is a short one. There is only one ground specifically stated in the rule, and I cannot see any evidence in support of it. I have not heard during the argument anything which leads me to suppose that there are any grounds existing, not stated in the rule, which, if they had been stated, could have afforded ground for a mandamus. It may possibly be—I do not say it is so—that the Council may have come to an erroneous decision with regard to the law, or have come to an erroneous decision with regard to the facts, but that is not a ground for a mandamus. I have not heard anything which leads me to suppose that any grounds exist on which a mandamus ought to be granted.

Appeal dismissed.

Solicitors for applicants: *Sterns.*
Solicitor for London County Council: *E. Tanner.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1914
Nov. 10, 12.

LONDON AND COUNTIES ASSETS COMPANY, LIMITED *v.* BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

Company—Director—Vacation of Office—Articles of Association—"If he become insolvent."

An article of association of the defendant company provided that "the office of a director shall be vacated:—(*a*) If he become bankrupt or insolvent or compound with his creditors. (*b*) If he become of unsound mind or be found a lunatic."

C., a director of the defendant company, assigned his salary as director to the plaintiffs. In an action by them in the City of London Court to recover the salary for the quarter from November 2, 1912, to February 1, 1913, the defendant company contended that C. was "insolvent" within the meaning of the above article on and before November 2, 1912, and that therefore his office of director had become vacated and no salary was due. At the trial it was proved that from 1908 to the end of 1912 a number of bankruptcy petitions had been presented against him, all of which, however, were dismissed by consent though C. did not pay the petitioning creditors' debts. In his evidence C. admitted that throughout the summer of 1912 he did not pay his debts as they fell due, but he said that, if given time, he would be able to liquidate all his liabilities, and that he had never had any meeting of his creditors nor offered any settlement. He was cross-examined upon a letter written by his solicitor to a creditor and upon an affidavit by him upon an application for the adjournment of a bankruptcy petition with the view of showing an admission of insolvency. The judge came to the conclusion that C. was insolvent within the meaning of article 25 (*a*) during the whole of 1912, and that his office was vacated and the quarter's salary was not due:—

Held, that, in order that a director should be "insolvent" within the meaning of the article, it was not necessary that there should be a definite act of insolvency done on a definite day from which it could be said that the insolvency dated; that there was evidence upon which the judge could find that C. was "insolvent" on November 2, 1912; and that therefore his office of director had become vacated, and no salary was due to him for the quarter.

Reg. v. *Saddlers' Co.* (1863) 10 H. L. C. 404 discussed.

Appeal from the judgment of a Divisional Court on appeal from the City of London Court.

The action was brought in the High Court to recover 50*l.*

C. A. 1914

LONDON AND COUNTIES ASSETS COMPANY, LIMITED v. BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

alleged to be due from the defendants to one James de Lara Cohen, of which debt the plaintiffs were assignees from Cohen. The action was ordered to be tried in the City of London Court.

The defendants were a limited company incorporated on February 2, 1912, under the Companies (Consolidation) Act, 1908. By article 19 of the articles of association James de Lara Cohen was named as a director of the company, and by article 22 each of the directors was to be paid as remuneration for his services a salary at the rate of 100*l.* a year, and the chairman was to be paid an additional sum at the rate of 50*l.* a year. Article 25 was as follows: "The office of a director shall be vacated:—(*a*) If he become bankrupt or insolvent or compound with his creditors. (*b*) If he become of unsound mind or be found a lunatic. (*c*) If he be convicted of an indictable offence. (*d*) If he cease to hold the necessary qualification in shares or stock, or do not obtain the same within one month from the date of his appointment. (*e*) If he absent himself from the meetings of directors for a period of six months without special leave of absence from the other directors. (*f*) If he give the directors one month's notice in writing that he resigns his office.

"But any act done in good faith by a director whose office is vacated as aforesaid shall be valid unless, prior to the doing of such act, written notice shall have been served upon the directors or an entry shall have been made in the directors' minute book stating that such director has ceased to be a director of the company."

Cohen was appointed chairman. The assignment from Cohen to the plaintiffs was dated January 16, 1913. The writ in the action was issued on March 12, 1913, and the 50*l.* claimed was made up of 37*l.* 10*s.* for salary due to Cohen as director and chairman for the quarter ending on February 1, 1913, and the balance for office rent due to him from the defendants. The defence was that Cohen was "insolvent" before August 2, 1912, that he had therefore on that date at latest vacated his office of director, and that the 37*l.* 10*s.* was not due to him; and as to the rest of the claim the defendants claimed to set off against it the sum of 37*l.* 10*s.* which had been paid to Cohen by the

defendants in respect of his services as director and chairman for the quarter from August 2 to November 1, 1912, on the ground that the sum had been paid to him under the mistake of fact that his office of director had not been vacated.

The evidence as to the alleged insolvency of Cohen was that seventeen bankruptcy petitions had been presented against him in the London Bankruptcy Court between September 22, 1908, and November 11, 1912, all of which had been dismissed by consent, though Cohen did not pay the petitioning creditors' debts, the creditors being content to wait, and twelve bankruptcy petitions had been presented against him in the Brentford County Court, the first having been presented on August 9, 1909, and the last on May 30, 1913, all of which were dismissed by consent, though Cohen did not pay the debts, except the last one which was pending at the date of the trial in the City of London Court on July 21, 1913. The dates of these petitions are set out in the judgment of Buckley L.J. In his cross-examination Cohen said that from June, 1912, he was not in a position to pay his just debts immediately; that he had not paid all his debts yet; that throughout the summer of 1912 he did not meet his debts immediately as and when they fell due, but given time he would be able to liquidate his liabilities; that he did not admit that he was insolvent; and that he never instructed his solicitors to settle with his creditors, and that he never had any meeting of creditors, and never offered any settlement, and never made any composition. He was also cross-examined upon a letter written by his solicitor on December 19, 1912, to a creditor who was suing him in the county court, and upon an affidavit made by him on December 2, 1912, upon an application for the adjournment of a bankruptcy petition, the contents of which are sufficiently indicated in the judgment of Pickford L.J. Neither the letter nor the affidavit was formally put in evidence.

In February, 1913, Cohen resigned his office of director.

The judge of the City of London Court (Sir Lumley Smith, K.C.) in giving judgment said: "I have to consider whether he was insolvent or not. He was capable of paying something because I find that 190*l.* due from him to the company

C. A. 1914

LONDON AND COUNTIES ASSETS COMPANY, LIMITED v. BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

was paid shortly after he ceased to be a director, but there is a body of evidence which satisfies me that he was in fact insolvent during the whole of 1912 and in the early part of 1913. I am satisfied he was insolvent in fact and within the meaning of the article." He therefore held that Cohen had ceased to be a director on August 2, 1912, and that therefore the 37*l.* 10*s.* was not due to him for salary for the quarter ending February 1, 1913; and that, as regards the 37*l.* 10*s.* for salary for the quarter ending November 1, 1912, that sum was paid to him under a mistake of fact, his insolvency not being then known, and that the defendants were entitled to set it off against the balance of the plaintiffs' claim. He accordingly gave judgment for the defendants.

The Divisional Court (Bray and Lush JJ.) held, upon the authority of *Reg.* v. *Saddlers' Co.* (1), that "insolvent" in article 25 of the articles of association of the defendant company meant notorious or avowed, in the sense of public, insolvency, and that there was no evidence of such insolvency in this case. They accordingly gave judgment for the plaintiffs for 50*l.*

The defendants by leave appealed.

Compston, K.C., and *Stephen Lynch*, for the defendants. If Cohen became "insolvent" within the meaning of article 25 (*a*) of the articles of association his office of director was automatically vacated: *In re Bodega Co.* (2) That is not contested by the plaintiffs. The only question is whether there was any evidence upon which the judge of the City of London Court was entitled to find, as he did, that Cohen was insolvent within the meaning of the article on August 2, 1912. It is not necessary, in order to bring the case within article 25 (*a*), that the insolvency should commence at some specific date. "Insolvent" in article 25 (*a*) means commercially insolvent. As Lord Ellenborough C.J. said in *Bayly* v. *Schofield* (3), "By insolvent circumstances is meant that a person is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do." In the same case Le Blanc J. said (at p. 353): "I take insolvency

(1) 10 H. L. C. 404. (2) [1904] 1 Ch. 276.
(3) (1813) 1 M. & S. 338, at p. 350.

as it respects a trader to mean that he is not in a situation to make his payments as usual; and that it does not follow that he is not insolvent because he may ultimately have a surplus upon the winding up of his affairs." "Insolvency" as there used means something short of bankruptcy or composition with creditors. The same meaning was given to the word insolvency in *Parker* v. *Gossage* (1), where the words were "bankruptcy or insolvency," Parke B. saying (at p. 620) that "the ordinary import of the word insolvency is an incapability of paying the party's just debts." In *Biddlecombe* v. *Bond* (2) the same meaning was given to the word in the same context. In *In re Muggeridge's Settlement* (3) a person took a life interest until he should become bankrupt or insolvent, and Page Wood V.-C. held that "insolvent" was not a technical term, but simply meant a person who was incapable of paying his debts. This general meaning of the word has been adopted by the Legislature in s. 39, sub-s. 1 (*b*), of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which gives the unpaid seller of goods the right to stop them in transitu in case of the insolvency of the buyer, and s. 62, sub-s. 3, declares that a person is deemed to be insolvent within the meaning of the Act "who cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not." In the present case Cohen was clearly unable, on and before August 2, 1912, to pay his debts in the ordinary course.

The case of *Reg.* v. *Saddlers' Co.* (4) forms the only exception in a long series of cases, but that decision turned upon its special facts. The House of Lords was there construing a by-law of the Saddlers' Company that "no person who has become a bankrupt, or otherwise insolvent, shall hereafter be admitted a member of the Court of Assistants of this Company, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the satisfaction of the Court, or the majority of them." There a period of seven years subsequent to the

(1) (1835) 2 C. M. & R. 617.
(2) (1835) 4 Ad. & E. 332.
(3) (1860) 29 L. J. (Ch.) 288.
(4) 10 H. L. C. 404.

C. A. 1914

LONDON AND COUNTIES ASSETS COMPANY, LIMITED v. BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

bankruptcy or insolvency was fixed, and therefore there must have been a definite date from which the seven years were to run. The House of Lords accordingly held that insolvent meant notorious or avowed in the sense of public insolvency. The context there required that construction. There is no such context here. The context here supports the construction contended for by the defendants. By clause (*b*) of article 25 the office of a director becomes vacated "if he become of unsound mind." That refers to a totally indefinite date. The question whether or not a man is of unsound mind is a question of medical opinion, and there need not be any open act of unsoundness of mind. The Divisional Court, consisting of Hamilton and Lush JJ., in *James* v. *Rockwood Colliery Co.* (1) took the view which the defendants are contending for of the meaning of the word "insolvent" in an article of association of a company similar to that in the present case. The word here is placed in conjunction with "or compound with his creditors," which is not necessarily or probably a notorious or avowed act. Though the word "insolvent" is not in regulation 77 in Table A of Sched. I. to the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), it was in the corresponding regulation (57) in Table A of the Companies Act, 1862 (25 & 26 Vict. c. 89), and in Palmer's Company Precedents, 11th ed., Part I., p. 729, it is said that the word "insolvent" is sometimes inserted. Further, even if *Reg.* v. *Saddlers' Co.* (2) applies to this case, there was evidence here of an avowed insolvency before August 1, 1912.

Gordon Hewart, K.C., and *Stuart Bevan*, for the plaintiffs. The defendants have failed to prove that Cohen was insolvent within the meaning of article 25 (*a*) either on August 2, 1912, or on November 2, 1912. All the bankruptcy petitions against him were dismissed except one in the Brentford County Court which was presented after this action was commenced and which was pending when the action was tried. There was a mere general suspicion of insolvency. There was no date on which the insolvency began. The context in article 25 (*a*) requires that the insolvency should commence from some fixed date capable of being ascertained. All the other clauses of article 25 specify

(1) (1912) 106 L. T. 128. (2) 10 H. L. C. 404.

events of which the commencement is certain except that in clause (*b*) "if he became of unsound mind." That, however, is a peculiar subject-matter, which from its nature must necessarily be uncertain in its commencement. It may be said that a person is insolvent where, upon taking an exact account of his assets and liabilities, it is found that he cannot immediately pay all his creditors. In that case a man may have been insolvent for some time without knowing it. That, however, is too vague and uncertain to apply to the word "insolvent" as used in this article, where it is essential that the exact time from which the insolvency of a director dates shall be ascertainable. To be "insolvent" within the meaning of article 25 (*a*) the director must in fact be unable to discharge his liabilities as they become due, and that fact must be avowed by some act done by him or by an order of a Court or by some act of a public nature, so that the commencement of the insolvency is ascertainable. This case is governed by the decision in *Reg.* v. *Saddlers' Co.* (1), and there must be a definite point of time from which the insolvency dates. There must be an "avowed or notorious insolvency," as Lord Westbury L.C. said (at p. 457); or, as Lord Cranworth put it (at p. 459), inability to pay debts in full proved by some outward act, such as stopping payment or compounding with creditors; or, as Lord Wensleydale said (at p. 463), "such an insolvency as is manifest publicly," or "public insolvency." Unless the word "insolvent" in this article is to be construed in that sense, a director might act as a director for years while all the time he was insolvent and had vacated his office. It would be serious if any suggestion of informality or illegality should arise from an unknown insolvency which perhaps had existed for years. There must be some change in the nature of a change of status. The cases referred to on the other side were all, except one, decided before *Reg.* v. *Saddlers' Co.* (1), and dealt with a different subject-matter. In *James* v. *Rockwood Colliery Co.* (2), decided in 1912, the plaintiff was trying to make an arrangement in the nature of a composition with his creditors and he declared himself to be insolvent. Cohen did nothing of that sort here. The construction of the word depends upon the context in which it occurs:

(1) 10 H. L. C. 404. (2) 106 L. T. 128.

C. A. 1914

LONDON AND COUNTIES ASSETS COMPANY, LIMITED v. BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

Parker v. *Gossage* (1); and in the context in which the word is used here it has the meaning given to it in *Reg.* v. *Saddlers' Co.* (2) There must be an overt, formal act which establishes that at a particular date the director was insolvent. *In re Muggeridge's Settlement* (3) was a very different case from the present. In that case Muggeridge was held bound by the recital in a deed poll which was executed by his creditors, the recital stating that he was unable to pay his debts in full and the operative part of the deed providing for a composition with his creditors. [*Billson* v. *Crofts* (4) was also referred to.]

No reply was called for.

BUCKLEY L.J. In this action the assignees of Cohen sue the defendants to recover 50*l.* Cohen had been a director and chairman of the defendant company, and under the articles of association of the company he was entitled to the yearly salary of 150*l.* The 50*l.* sued for is made up of 37*l.* 10*s.* in respect of salary as a director for the three months from November 2, 1912, to February 1, 1913, and 12*l.* 10*s.* for the rent of certain premises. There is no dispute that this latter sum is due. The defendants in answer to the claim say that Cohen had ceased to be a director of the defendant company on or before August 2, 1912; that he had wrongly received 37*l.* 10*s.* for salary as a director for the three months from August 2 to November 1, 1912; and that no salary was due to him for the three months from November 2, 1912, to February 1, 1913. They contend therefore as to the 12*l.* 10*s.* that they have a set-off of a larger sum which Cohen has received under a mistake of fact and to which he is not entitled, and as to the 37*l.* 10*s.* that this sum is not due.

The question is whether Cohen is entitled to salary as a director for either of those periods of three months beginning respectively on August 2 and November 2, 1912. The defendants rely upon article 25 (*a*) of the articles of association of the company, which provides that "the office of a director shall be vacated:—(*a*) If he become bankrupt or insolvent or compound with his creditors."

(1) 2 C. M. & R. 617.
(2) 10 H. L. C. 404.
(3) 29 L. J. (Ch.) 288.
(4) (1873) L. R. 15 Eq. 314.

They say that he became insolvent on or before August 2, 1912, and that therefore he had ceased to be a director on that date. The judge of the City of London Court upon the evidence before him came to the conclusion that Cohen was in fact insolvent during the whole of 1912 and in the early part of 1913, and he gave judgment for the defendants. The Divisional Court held that there was no evidence that Cohen was insolvent within the meaning of the article, and gave judgment for the plaintiffs. The defendants appeal to this Court.

The first question is, What is the meaning of the words "if he become insolvent" in this article appearing, as it does, between the words "bankrupt" and "compound with his creditors"? It is said that, as the words "bankrupt" and "compound with his creditors" imply definite acts done at definite times, the word "insolvent" must be read in the same sense. Insolvency is not, in its ordinary sense, a state or condition which necessarily begins at a known and definite date. It is said, however, that the context requires that it should have that meaning, and that the event upon the happening of which the director is to cease to be a director must be some definite and known event. In my opinion this contention is not sound. The very next clause in article 25 provides that the office of director shall be vacated "if he become of unsound mind." That is quite indefinite. The inception of unsoundness of mind is necessarily uncertain. Whether a person is or is not of unsound mind is a question of medical opinion, and must be investigated upon medical evidence. In this context the insolvency need not necessarily date from a definite and known event.

There are decisions as to the meaning of the word "insolvent." They all state that "insolvency" means commercial insolvency, that is to say, inability to pay debts as they become due. I need not refer to the details of the cases. They are these: *Bayly* v. *Schofield* (1) in 1813; *Parker* v. *Gossage* (2) in 1835; and *In re Muggeridge's Settlement* (3) in 1860. In this last case a life estate was limited to a person until he should be bankrupt or insolvent, and Wood V.-C. said: "As to the meaning of the

(1) 1 M. & S. 338.
(2) 2 C. M. & R. 617.
(3) 29 L. J. (Ch.) 288.

C. A. 1914

LONDON AND COUNTIES ASSETS COMPANY, LIMITED v. BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

Buckley L.J.

word 'insolvent' it is now settled that it is not a technical term, but simply means a person who is incapable of paying his debts," and he held that the life interest had determined upon insolvency in the commercial sense.

It is said, however, that the construction of the word "insolvent" must now be determined differently since the decision of the House of Lords in *Reg.* v. *Saddlers' Co.* (1) The facts in that case were that in 1799 the Saddlers' Company made a by-law "that no person who has become a bankrupt, or otherwise insolvent, shall hereafter be admitted a member of the Court of Assistants of this Company, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the satisfaction of the Court or the majority of them." The House of Lords held that "insolvency" in that by-law meant, not a mere inability to pay debts in full, but an inability proved by some outward act, or, as Lord Westbury said (2), "notorious or avowed insolvency, such as would be the consequence of a public stoppage in business, or of a trader calling his creditors together and obtaining time or terms of indulgence, or of his entering into a deed of composition." The first observation I make upon that is that the instances given by Lord Westbury are only instances of insolvency, and neither are nor are stated to be exhaustive. Beyond that the decision in that case seems to me to turn upon the particular words of that by-law, namely, that there must be a definite point of time from which the seven years were to be computed. All the noble Lords laid stress upon the provision of the by-law allowing a period of seven years subsequent to the bankruptcy or insolvency during which the bankrupt or insolvent might establish a fair and honourable character. The decision was that the words "or otherwise insolvent" meant something similar to "bankrupt," and that after the expiration of the seven years the man was to be free from the stigma of bankruptcy or insolvency if he complied with the

(1) 10 H. L. C. 404. (2) 10 H. L. C. at p. 457.

conditions of the by-law. That case depends upon its own special facts.

That being the law upon the point, how do the facts stand? The question is whether on August 2, 1912, such a state of facts existed as that Cohen had then ceased to be a director of the company. To put the question in another form, had Cohen on or before that date become insolvent? He was asked in cross-examination whether from June, 1912, he was in a position to pay his just debts, and he answered that he was not in a position to pay them immediately. Further, seventeen bankruptcy petitions had been presented against him in the London Bankruptcy Court and twelve in the Brentford County Court. Of the London petitions the first was presented on September 22, 1908, three were presented in 1909, six in 1910, two in 1911, two in 1912 down to the end of February, and three more in 1912 after August 1. The two petitions presented at the beginning of 1912 were for non-compliance with a bankruptcy notice. Of the Brentford petitions the first was presented on August 9, 1909, seven were presented in 1910, one in 1912 before August 1, and two later in that year, and one in 1913. The history of those petitions is as follows. All were from time to time dismissed—except the one presented in 1913 in the Brentford County Court, which was pending when this action was tried in the City of London Court—not because Cohen paid the petitioning creditors' debts, but because apparently the creditors thought that they would get nothing by them. He asked for time to pay and they gave him time. In my opinion there were ample materials upon which the judge was entitled to find that Cohen was insolvent on August 2, 1912. Later in that year, on December 2, he made an affidavit, and on December 19 his solicitor wrote a letter, neither of which are formally in evidence, but he was cross-examined upon them, and from his admissions we get further evidence of his position. But as these are subsequent to August 2, 1912, I do not go into them. In my opinion there was evidence that Cohen was "insolvent" in the sense which I have stated on August 2, 1912, within the meaning of article 25 (*a*); and, even if the decision in *Reg.* v. *Saddlers' Co.* (1) applies, there was here an avowed insolvency

(1) 10 H. L. C. 404.

C. A. 1914

LONDON AND COUNTIES ASSETS COMPANY, LIMITED v. BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

similar to the instances given by Lord Westbury in that case. I must not be understood as saying that a man is necessarily insolvent at a particular date because if he had examined carefully into his accounts he would have ascertained that he was then unable to meet all his liabilities. That is not this case. There was here evidence upon which the judge of the City of London Court could find that Cohen was insolvent within the meaning of this article on and before August 2, 1912.

The Divisional Court were, in my judgment, wrong in holding that there was no evidence of insolvency. The appeal will be allowed.

PHILLIMORE L.J. I am of the same opinion. I observe that in the precedent given in Palmer's Company Precedents, 11th ed., Part I., p. 729, the word "insolvent" is omitted, though the other expressions "if he becomes bankrupt or compounds with his creditors" are left in. I cannot help thinking that to insert the word "insolvent" in article 25 (*a*) of the articles of association of the defendant company was not a very wise piece of drafting, but it is a common expression, and we have to construe it. But for the decision in *Reg.* v. *Saddlers' Co.* (1) I do not think that there would have been much argument as to the meaning of the word. Before, however, considering the decision in *Reg.* v. *Saddlers' Co.* (1) I should like to notice the history of the word "insolvent" as a legal term. As Willes J. pointed out in advising the House of Lords in *Reg.* v. *Saddlers' Co.* (2), and as indeed appears from the case of *Bayly* v. *Schofield* (3), the expression "in insolvent circumstances" had received a statutory meaning as early as 19 Geo. 2, c. 32, an Act for amending the laws relating to bankrupts. Under that Act, stating it shortly, moneys received by a creditor from a debtor, who had committed an act of bankruptcy and who afterwards became bankrupt, bona fide and without notice that he was "in insolvent circumstances," were protected. In that sense the word "insolvent" had acquired some legal meaning. There was no Act for the relief of insolvent debtors at the time the by-law in *Reg.* v. *Saddlers' Co.* (1) was passed.

(1) 10 H. L. C. 404. (2) Ibid. at p. 425.
(3) 1 M. & S. 338, at pp. 349, 350.

As far as I can discover, the Act 41 Geo. 3, c. 70, intituled "An Act for the relief of certain insolvent debtors," for the first time enabled an insolvent debtor to obtain his discharge from prison upon signing a schedule containing a full statement of all his property, and, as the procedure was subsequently elaborated, upon executing a warrant of attorney to confess judgment in the future, so that any after-acquired property could be seized. By 53 Geo. 3, c. 102, the Court for the Relief of Insolvent Debtors was first established. Until the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), a non-trader could not have been made bankrupt, a fact which placed him in a position of disadvantage as compared with a trader, at any rate down to the time of the passing of the first Act for the relief of insolvent debtors. Sect. 69 of the Act of 1861 abolished that distinction, and from that time "insolvency" as meaning a person who, not being a bankrupt, might obtain relief from the Insolvent Debtors' Court, ceased to exist. Only this remained. There must have been at the date of the commencement of the Act a number of insolvent debtors under the previous legislation, who remained such after that Act had come into operation, and no doubt there were many who possessed that status at the time of the decision in *Reg.* v. *Saddlers' Co.* (1) in 1863, because the officials of the Insolvent Debtors Court were not finally provided for until the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 153. So that, while it is true to say that at the date of the decision in *Reg.* v. *Saddlers' Co.* (1) there would be no future insolvents as such, there were existing insolvents, and there had been until quite recently an Insolvent Debtors' Court. Whether or not that had any bearing on the decision of the House of Lords I am not quite certain. Be that as it may, the decision in *Reg.* v. *Saddlers' Co.* (1) turned upon the facts as set forth in the special verdict, which are stated at p. 406 of the report, and it was to that state of facts that the decision of the House of Lords applied. Lord Westbury L.C. said this (2): "With respect to the construction of these words I think they must be held to mean notorious or avowed insolvency, such as would be the consequence of a public stoppage in business, or of a trader calling

(1) 10 H. L. C. 404. (2) Ibid., at p. 457.

C. A.
1914

LONDON AND COUNTIES ASSETS COMPANY, LIMITED v. BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

Phillimore L.J.

his creditors together and obtaining time or terms of indulgence, or of his entering into a deed of composition. These and other modes of avowed insolvency were common at the time of the passing of this bye-law, although no statute relating to insolvent debtors as contra-distinguished from bankrupts was then in existence. This construction of the word 'insolvent,' as meaning avowed or notorious insolvency, is consistent with the provision for restoring the competency of the trader, if he has established a fair and honourable character for seven years subsequent to his bankruptcy or insolvency; where the word 'insolvency' must mean a fact ascertained at some period of time from which the seven years may be computed." The Lord Chancellor infers that there must be a fixed date from which the seven years were to run, and he had in his mind the consideration that the character taken away by open insolvency could be recovered by the subsequent fair and honourable conduct. Lord Cranworth said (1): "I interpret the word 'insolvency' to mean not mere inability of the person to whom it refers to pay his debts in full, but inability proved by some outward act, such as stopping payment, or compounding with his creditors." He then proceeded to lay stress upon the provision as to the disqualifying effect of the insolvency being taken away by seven years of fair and honourable conduct after the insolvency. Lord Wensleydale said (2): "There would be great inconvenience from such an inquiry into private affairs. It is clear, besides, that the by-law means such an insolvency as is manifest publicly, for from a secret insolvency the period of seven years cannot be well calculated; and therefore there is good reason for saying that a different kind of insolvency is intended. I cannot help thinking it quite clear that the term 'insolvent' means public insolvency; not necessarily the taking the benefit of, or being made liable to, the Insolvent Act, but being incapable to pay his debts in ordinary course; or, in other words, having stopped payment." Lord Chelmsford said (3): "The words are not 'has been a bankrupt or insolvent,' but, 'has been a bankrupt, or become otherwise insolvent,' which appear to me to

(1) 10 H. L. C. at p. 459. (2) Ibid. at p. 463.
(3) Ibid. at p. 467.

point with sufficient precision to a state of circumstances which in a popular sense implies an insolvent condition; as where a person (to use a familiar expression) is unable to pay his way, or to discharge his debts in regular course according to the habits of business of solvent tradesmen." From all these opinions I draw this inference. One ought not to pry into a man's private affairs; one ought not to reason back from something which has afterwards happened and say that he must have been insolvent on a past date. One must take for this purpose as the criterion something which has been communicated to one or more persons and which may perhaps have to go so far as an admission that he is in fact insolvent. It may be that there must be some overt act, though perhaps not a very formal act; not such a formal act as would preclude the person affected from saying that the statement was made under a mistake as to his position. But if he cannot say that, either because he cannot say it truthfully or because the act is so formal that he is estopped by it, and if it is an overt act in the sense that it is communicated to one or more persons, it seems to me that there is nothing in *Reg.* v. *Saddlers' Co.* (1) which prevents the Court from saying that a man is insolvent who has made that amount of admission. That seems to me to be the view that was taken by the Divisional Court in *James* v. *Rockwood Colliery Co.* (2), a case which it is difficult to distinguish from the present one. Having regard to the other decisions and to what was said in *Reg.* v. *Saddlers' Co.* (1), and to the reason of the thing, I think we are entitled and bound to apply our minds to the question whether or not in the present case there was evidence that Cohen had admitted that he was in fact insolvent. Bearing in mind that test, which is the one most favourable to the plaintiffs as the assignees of Cohen, I come to the conclusion that there was evidence before the learned judge of the City of London Court that Cohen was insolvent sufficiently far back to enable the defendants not merely to resist the claim to recover remuneration as director for the quarter ending February 1, 1913, but also to set off against the claim for rent the money which the defendants paid to Cohen as remuneration for the

(1) 10 H. L. C. 404. (2) 106 L. T. 128.

C. A. 1914

LONDON AND COUNTIES ASSETS COMPANY, LIMITED v. BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

quarter ending November 1, 1912, in ignorance of his insolvency. I do not go into the details of the evidence, as this has been done by Buckley L.J. Upon these grounds I think that the appeal should be allowed.

PICKFORD L.J. I am of the same opinion. The question we have to decide is whether Cohen was within the meaning of article 25 (*a*) of the articles of association of the defendant company "insolvent" on August 2, 1912. The word "insolvent" may have different meanings according to the context in which it is to be found, and I do not know that we get very much assistance from other cases in which it has been used in a different context or from such an instance of its use as that in the Sale of Goods Act, 1893. The plaintiffs found their argument on the case of *Reg.* v. *Saddlers' Co.* (1) I think it may be said that the decision in that case was that "insolvent" in the by-law there under discussion meant notorious or avowed insolvency, or insolvency proved by some outward act, or public insolvency. Those are the words in which it is variously described by the noble Lords who took part in the decision of that case. Some limitation must be put upon the word "public," because the instance which some of the noble Lords gave of compounding with creditors is not public in the widest sense. It is an act public to a certain body of persons, namely, the creditors, and therefore the word "public" must be limited in that way. The argument for the plaintiffs, as I understand it, is that, in order to have what may be called an avowed or notorious or public insolvency evidenced by some overt act, there must be a formal act, a formal declaration of insolvency such as is mentioned in some of the cases, namely, a composition deed, a deed of arrangement, a declaration of inability to pay debts, or the like, so that the date at which the insolvency commenced can be ascertained. I cannot assent to that view. I think one must be able properly to infer notorious or avowed or, in the sense which I have mentioned, public insolvency from acts which are not necessarily such formal acts as those which have been mentioned, and the question is whether there was in

(1) 10 H. L. C. 404.

this case evidence from which the judge of the City of London Court could infer insolvency of that kind. I say insolvency of that kind without saying in the least that it is thus limited. I do not say that there may not be insolvency within the meaning of this article which is not so notorious or avowed. I do not stay to consider that. I assume that the insolvency must be notorious or avowed or public in the sense that I have mentioned.

In the present case the facts are shortly these. From 1908 to November, 1912, there were seventeen petitions in bankruptcy presented against Cohen in the London Bankruptcy Court. No one of those was satisfied by payment, and in respect of no one of them, as I understand, was any payment ever made. They were got rid of by some inducement being held out to the creditors to allow them to stand over in the hopes that they would be paid, and then they were dismissed. From 1909 to 1913 there were twelve bankruptcy petitions against Cohen in the Brentford County Court. They were all dismissed except one, but in respect of no one of them was any payment made. In addition to that there was an affidavit filed in order to obtain the postponement of one of the petitions, which contains as clear a declaration of insolvency as can possibly be. It states in effect to the particular creditor that Cohen's family are interested as creditors and that they will hold over their claims, and that if that be done he hopes he will be able to pay 5*s.* in the pound at an early date, and that all that he required was twelve months' grace within which he could pay the creditors in full. Then there was a letter written to another creditor by Cohen's solicitor, which was not actually put in but upon which Cohen was cross-examined, and it states that Cohen's affairs were very embarrassed, that there was nothing upon which a creditor could levy if he recovered judgment, and that it was intended to ask his creditors to give him twelve months' time in which to turn round and pay his creditors in full. I read the evidence given by Cohen in the City of London Court as an admission, though he does not say so in terms, of insolvency throughout the whole period. Taking all the evidence together it seems to me to be impossible to say that there was not evidence of avowed insolvency—I have no doubt

C. A. 1914

LONDON AND COUNTIES ASSETS COMPANY, LIMITED v. BRIGHTON GRAND CONCERT HALL AND PICTURE PALACE, LIMITED.

Pickford L.J.

whatever about that—and that there was not evidence of notorious insolvency. I do not believe that any person who had business dealings with Cohen could possibly have been ignorant of the state of his affairs. I exclude from that a director of the company, who may have known nothing about him except that he was a co-director. It seems to me the insolvency was obvious; it certainly was avowed, and I think it was notorious; and at any rate there was evidence upon which the learned judge could so find. Therefore, without saying that what is called by Lord Wensleydale in *Reg.* v. *Saddlers' Co.* (1) secret insolvency would be sufficient to satisfy this article, I think that there was evidence upon which the learned judge was entitled to find that Cohen was "insolvent" within the meaning of the article on and after August 2, 1912. The appeal must therefore be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Zeffertt & Co.*
Solicitor for defendants: *S. S. Seal.*

(1) 10 H. L. C. at p. 462.

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1914
Nov. 23, 26.

In re AN ARBITRATION BETWEEN STOKER AND MAYOR, &c., OF MORPETH. (1)

Local Government — "Street" — Paving Expenses — Apportionment among Frontagers—Dispute as to Apportionment—Arbitration—Appointment of Arbitrator by Urban Authority—Withdrawal by Frontager of Notice disputing Apportionment—Jurisdiction of Arbitrator—Award finding Place a "Street"—Validity—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 150, 180.

By s. 150 of the Public Health Act, 1875, an urban authority may pave and make up a "street" (not being a highway repairable by the inhabitants at large) and may recover the expenses thereof from the frontagers in such proportion as is settled by their surveyor or in case of dispute by arbitration in manner provided by the Act.

By s. 180, with respect to arbitrations under the Act, the following regulations shall be observed:—Every appointment of an arbitrator shall be deemed a submission to arbitration by the party making it; the appointment shall not be revoked without the consent of both parties; and if for the space of fourteen days after notice in writing by the party who has appointed an arbitrator has been given to the other party the latter fails to appoint an arbitrator, the arbitrator so appointed shall be deemed to be appointed by and shall act on behalf of both parties.

An urban authority under s. 150 paved and made up a place as being a "street" within the meaning of the Act, and their surveyor apportioned the expenses among the frontagers. One of the frontagers gave notice of objection to the apportionment upon him upon the ground that the greater part of the place paved and made up was private property and not a "street," and that only a small part of his premises fronted on a "street." The urban authority thereupon appointed an arbitrator under s. 180, and the frontager, who had not appointed an arbitrator, before the expiration of fourteen days after service upon him of notice of the appointment of the arbitrator by the urban authority, gave notice to the urban authority that he withdrew the notice disputing the apportionment upon the ground that the sole question was one of law as to whether the whole of the place paved and made up was a "street," which the arbitrator could not determine. The urban authority refused to accept the notice of withdrawal, and the arbitrator appointed by them proceeded with the arbitration as sole arbitrator, and made an award against the frontager for the sum apportioned in respect of his premises, stating in his award that he found as facts that the

(1) Report unavoidably delayed by pressure of other matter.

C. A.

1914

STOKER AND MORPETH CORPORATION'S ARBITRATION, *In re.*

place was a "street" within the meaning of the Act, and that it was not repairable by the inhabitants at large. Upon a motion by the frontager to set aside the award:—

Held, that the frontager, not having appointed an arbitrator to act for him, was entitled to withdraw his notice disputing the apportionment within the fourteen days; that having done so there was no submission by him to arbitration; and that therefore the arbitrator had no power to act as sole arbitrator, and the award was a nullity and must be set aside.

Held, also, that, even if the arbitrator had jurisdiction to make an award, he had exceeded his jurisdiction in determining that the place was a "street" within the meaning of the Act and was not repairable by the inhabitants at large, and that upon this ground also the award must be set aside.

APPEAL from an order of a Divisional Court setting aside, upon the application of Alfred Ernest Stoker, the award of an arbitrator under the Public Health Act, 1875.

Stoker was the owner of premises situate at or adjoining an area known as the Fox and Hounds Yard, Morpeth. The yard was 240 feet in length.

On December 31, 1912, the corporation, as the urban authority, served a notice upon the frontagers, including one Mary Morrison, the predecessor in title of Stoker, requiring them to level, pave-flag and channel the area within a time therein specified. The frontagers did not comply with the notice, and the corporation executed the works therein referred to in accordance with the provisions of s. 150 of the Public Health Act, 1875. The corporation incurred expenses to the amount of 97*l.* 14*s.* in executing the works, and their surveyor apportioned the sum of 19*l.* 16*s.* 3*d.* as the sum due from Stoker for a frontage of 112 feet.

On August 29, 1913, the corporation served upon Stoker a notice dated August 28, 1913, of the amount apportioned by the surveyor as due from him to the corporation, and on November 28, 1913, Stoker served notice in writing on the corporation under s. 257 of the Public Health Act, 1875, that he disputed the apportionment. Negotiations then took place between Stoker and the corporation, Stoker disputing the apportionment, not on the ground that there was any mismeasurement or other defect of that kind, but solely on the legal ground that by far the larger portion of the area paved, and in respect of which the expenses

were incurred, was not a "street" but was private property, his contention being that out of the 112 feet in respect of which the apportionment was made upon him about 90 feet fronted on private property and not upon a "street."

On December 11, 1913, the corporation by their town clerk wrote to Stoker's solicitor saying that he was instructed to take the steps necessary to have the question decided by arbitration under s. 150 of the Public Health Act, 1875, and that "the question for the arbitrator being limited to the proportion to be borne by your client seems to be one of measurement only, for which purpose a single arbitrator would appear to be sufficient." On December 24, 1913, Stoker's solicitor wrote to the town clerk: "With reference to your letter of the 11th December I do not think the appointment of an arbitrator will help in this matter as my client's objection to payment is really a legal one. I am quite prepared to meet you and your surveyor and discuss and settle the measurement." Further correspondence ensued, in the course of which Stoker's solicitor wrote on February 4, 1914: "I repeat that my client is willing to pay for the small portion of the roadway opposite his back gates . . . . In order that there may be no misunderstanding my client's contention is that the remainder of the amount demanded has been incurred in making up a yard which is private property and is not a street within the meaning of the Public Health Act. This is a point which an arbitrator cannot settle." In reply the town clerk wrote on February 9 that "your client still disputes the proportion of expenses with which he is chargeable. That in fact is the only point at issue. Thus you make arbitration inevitable." On February 10, 1914, the corporation, in pursuance of the provisions of ss. 179 and 180 of the Public Health Act, 1875 (1),

(1) 38 & 39 Vict. c. 55, s. 179: "In case of dispute as to the amount of any compensation to be made under the provisions of this Act (except where the mode of determining the same is specially provided for) and in case of any matter which by this Act is authorised or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party shall appoint an arbitrator to whom the matter shall be referred."

Sect. 180: "With respect to arbitrations under this Act, the following regulations shall be observed; (that is to say,)

"(1.) Every appointment of an arbitrator under this Act when

C. A. 1914

STOKER AND MORPETH CORPORATION'S ARBITRATION, *In re.*

appointed J. T. Pegge arbitrator on their behalf to settle and determine the dispute, and on February 11 they served notice of the appointment upon Stoker, accompanied by a copy of the appointment.

Stoker did not appoint an arbitrator, and on February 24, 1914 (within fourteen days after the service upon him of the notice of the appointment by the corporation of their arbitrator), Stoker's solicitor wrote to the town clerk stating that he had already pointed out that his client's objection rested on a purely legal point, and that no benefit would be derived from holding the arbitration, and "under these circumstances, on behalf of my client, I withdraw the notice served on you on 28th November last disputing the apportionment," without prejudice to his client's right to raise his legal contention hereafter in any way he might be advised. In reply the solicitor to the corporation wrote (so far as material) that the appointment of an arbitrator once made was irrevocable except by consent of both parties, and he could not advise his clients to agree to the revocation of the appointment of their arbitrator.

On March 3, 1914, the arbitrator served upon Stoker formal notice that he had appointed March 18, 1914, for proceeding with the arbitration. Stoker declined to attend or to be represented at the proceedings, and on March 21 the arbitrator made his award.

The award after a number of recitals was (omitting formal

---

made on behalf of the local authority shall be under their common seal . . . .

"(2.) Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same.

"(3.) After the making of any such appointment the same shall not be revoked without the consent of both parties, ...

"(4.) If for the space of fourteen days after any matter by this Act authorised or directed to be settled by arbitration has arisen, and notice in writing by one party who has duly appointed an arbitrator has been given to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fails to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties."

parts) as follows:—"I do make and publish this my award in writing of and concerning the said matters as follows: That is to say,

"Firstly I declare as a fact—

"1. That all notices have been properly served under the Public Health Act.

"2. That Mr. Stoker or the owner of the premises had failed to execute the works specified.

"3. That the Fox and Hounds Yard is a street within the meaning of s. 4 of the Public Health Act, 1875.

"4. That the portion of such street forming the subject of this reference is not repairable by the inhabitants at large.

"5. That the cost of making it up under section 150 is properly payable by the owners of premises fronting adjoining or abutting on such street.

"6. That Mr. Stoker is the owner of property fronting adjoining or abutting on the said street to the extent of one hundred and twelve feet and ten inches including the gateway.

"I now do award and determine that—

"1. The contribution payable by Mr. Stoker in respect of his premises is 19*l.* 16*s.* 3*d.* That the said Alfred Ernest Stoker as the person chargeable shall pay the whole of the costs of this arbitration to be duly taxed and the arbitrator's charges and expenses amounting to the sum of 7*l.* 14*s.* 10*d.*"

The corporation duly demanded payment of the said sum of 19*l.* 16*s.* 3*d.* and 31*l.* 3*s.* 4*d.* for the taxed costs, and Stoker thereupon gave notice of motion to have the award set aside upon the grounds that there was no submission between the parties; that the arbitrator had no jurisdiction to make the award; and that, if he had jurisdiction, he exceeded his jurisdiction in considering and purporting to decide the matters set out and numbered 1 to 6 in his award.

The Divisional Court (Lord Coleridge and Shearman JJ.) held that the arbitrator had exceeded his jurisdiction in deciding the questions of law that the yard was a "street" within the meaning of s. 4 of the Public Health Act, 1875, and that it was not repairable by the inhabitants at large, and set aside the award.

The corporation appealed.

C. A. 1914

STOKER AND MORPETH CORPORATION'S ARBITRATION, *In re.*

Holman Gregory, K.C., and *R. I. Simey*, for the corporation. It is admitted that the arbitrator cannot finally decide questions of law, as, for instance, whether the place is a "street" and is not a highway repairable by the inhabitants at large within the meaning of s. 150 of the Public Health Act, 1875, any such question being for the Local Government Board to decide under s. 268: *Wake* v. *Sheffield Corporation* (1) and *Derby Corporation* v. *Grudgings*. (2) An arbitrator can only determine questions of amount, not of liability: *In re Willesden Local Board and Wright*. (3) But as incidental to and necessary for the purpose of arriving at the question of the amount of apportionment the arbitrator must determine what is the length of the "street" and what is the length of the particular frontage. He may therefore provisionally determine certain questions of law. "This construction of the statute does not leave the parties without remedy for a mistake in law by the arbitrator, for he can be asked to state a case": per Lord Esher M.R. in *Sandgate Local Board* v. *Keene*. (4) In the same case Fry L.J. said (5) that "It may well be that the arbitrator may have to determine matters arising on the construction of the statute." It is not suggested that the arbitrator has jurisdiction to determine questions of law so as to bind the parties: *Reg.* v. *Hutchings* (6); *Wakefield Corporation* v. *Cooke* (7); *In re Hanwell Urban Council and Smith*. (8) The arbitrator here did not purport to decide that the place was a "street" or that it was not repairable by the inhabitants at large, and that Stoker was the owner of property fronting on the street. He did not determine any question of liability. He expressly states that he finds these matters as facts, and he finds them as facts incidental to the question of apportionment. The award is therefore not in excess of jurisdiction. The arbitrator did not mean to make those six findings part of his award. His award binding on the parties begins, after he has stated those findings, with the words

(1) (1883) 12 Q. B. D. 142, at p. 146.
(2) [1894] 2 Q. B. 496, at pp. 504, 507, 510.
(3) [1896] 2 Q. B. 412, at p. 416.
(4) [1892] 1 Q. B. 831, at p. 834.
(5) Ibid. at p. 835.
(6) (1881) 6 Q. B. D. 300.
(7) [1902] 1 K. B. 188.
(8) (1904) 68 J. P. 496.

"I now do award and determine." [*Robinson* v. *Barton-Eccles Local Board* (1) was also referred to.]

Macmorran, K.C., and *Scholefield*, for Stoker. By s. 150 of the Public Health Act, 1875, the urban authority may recover the expenses of paving and making good a street not being a highway repairable by the inhabitants at large from the frontagers "in such proportion as is settled by the surveyor of the urban authority or (in case of dispute) by arbitration." Therefore the arbitrator is in the same position as the surveyor, and can only do what the surveyor can do. The surveyor and therefore the arbitrator can only determine the amount of the apportionment, and unless there is a dispute as to the apportionment there is nothing to arbitrate upon: *Bayley* v. *Wilkinson* (2); *Folkestone Corporation* v. *Brooks* (3); *West Hartlepool Corporation* v. *Robinson* (4); and the urban authority can bring an action to recover the amount. The arbitrator must assume that the place is a street, and upon that assumption he must measure the frontages and apportion the expenses. He cannot decide the question of law whether the place is a "street" within the meaning of the Public Health Act, 1875: *In re Hanwell Urban Council and Smith.* (5) The arbitrator in the present case took upon himself to decide that the yard was a "street" and that the frontager was liable for a proportion of the expenses of paving it. In doing so he exceeded his jurisdiction. All the six findings of the arbitrator are in excess of his jurisdiction, and the Divisional Court were right in setting the award aside. If the award was allowed to stand Stoker would be embarrassed by those findings in any proceedings taken before the Local Government Board under s. 268 or in the Courts. The fact that the arbitrator prefaced those six findings by the words "I declare as a fact" cannot alter their nature. They are conclusions of law. The Court will set aside an award which contains ultra vires findings.

Further, there was no dispute before the arbitrator and no submission to him, and therefore he had no jurisdiction to make

(1) (1883) 8 App. Cas. 798.
(2) (1864) 16 C. B. (N.S.) 161.
(3) [1893] 3 Ch. 22, at p. 27.
(4) (1897) 77 L. T. 387.
(5) 68 J. P. 496.

C. A. 1914

STOKER AND MORPETH CORPORATION'S ARBITRATION, *In re.*

an award. The corporation gave Stoker notice of the appointment of their arbitrator on February 11 and within fourteen days, namely, on February 24, Stoker withdrew his notice disputing the apportionment served on the corporation on November 28. Sect. 180 of the Public Health Act, 1875, deals with arbitrations as to disputes. By sub-s. 2 the appointment of an arbitrator "shall be deemed a submission to arbitration by the parties making the same." Therefore a submission to arbitration by both parties is necessary. If one party appoints an arbitrator and the other party fails for fourteen days to appoint his arbitrator, sub-s. 4 says that the arbitrator appointed "shall be deemed to be appointed by and shall act on behalf of both parties." The submission becomes complete either upon each party appointing an arbitrator or upon one party appointing an arbitrator and the other party not appointing one for fourteen days. The fourteen days here did not expire until February 25, and before their expiration Stoker had withdrawn his notice disputing the apportionment. He had a right to do so: *Bayley* v. *Wilkinson*. (1) After he had done that there was nothing to arbitrate upon, and the arbitrator appointed by the corporation had no jurisdiction to act. There is no question here of revoking the appointment of an arbitrator, and therefore sub-s. 3 has no application. The words in that sub-section that an appointment of an arbitrator "shall not be revoked without the consent of both parties" must mean without the consent of the other party. The award was therefore made without jurisdiction and ought to be set aside. [*Davis* v. *Witney Urban Council* (2) was also referred to.]

Holman Gregory, K.C., in reply. With regard to the point of withdrawal of the notice of dispute, s. 180, sub-ss. 2, 3, and 4, must be read together. A frontager may expressly, by appointing an arbitrator, or impliedly, by failing within fourteen days after the appointment by the other party of an arbitrator, submit to arbitration. Where one party has appointed an arbitrator the appointment is complete and can only be revoked under sub-s. 3 with the consent of both parties. If the other party fails for fourteen days to appoint an arbitrator the arbitrator who has been appointed acts for both parties. There is then a complete

(1) 16 C. B. (N.S.) 161.

(2) (1899) 63 J. P. 279.

submission by both parties to that arbitrator. After the appointment of the arbitrator it is too late for the other party to withdraw, and the dispute must be settled by arbitration. The arbitration proceedings have then been started and the arbitration must run its course under s. 180. In the present case Stoker was too late in withdrawing his notice of dispute after the corporation had appointed their arbitrator, and the latter after the expiration of the fourteen days became arbitrator for both parties. In *Bayley* v. *Wilkinson* (1) the notice of dispute was withdrawn before the arbitrator was appointed.

BUCKLEY L.J. The question which the Court have to determine is whether the award of the arbitrator is or is not bad. [The Lord Justice stated the facts and referred to the correspondence between the parties.] It is clear from the correspondence that Stoker raised the legal objection to the apportionment that 90 feet out of the 112 feet in respect of which the apportionment was made fronted, not on a "street," but on private property, that his frontage was 22 feet and not 112 feet, and that therefore the amount of the expenses apportioned was wrong. The award consists of two parts. After the words "I do make and publish this my award" the arbitrator does two things. He first finds six facts, and then he proceeds to award and determine that Stoker's contribution is 19*l.* 16*s.* 3*d.* (a sum which was never in dispute if the whole of the 112 feet fronted on a "street"), and that Stoker, as the person chargeable, is to pay the costs of the arbitration to be taxed and the arbitrator's charges and expenses amounting to 7*l.* 14*s.* 10*d.*

For this part of my judgment I assume that the arbitrator had jurisdiction to make an award. I assume that inasmuch as Stoker did not appoint his arbitrator within fourteen days after the service on him of the notice of appointment by the corporation of their arbitrator, by virtue of s. 180, sub-s. 4, of the Public Health Act, 1875, the arbitrator appointed by the corporation became sole arbitrator. The arbitrator in the first part of his award has declared as facts that which he had no jurisdiction to determine. He has declared as a fact "that the Fox and Hounds Yard is a street within the meaning of s. 4 of

(1) 16 C. B. (N.S.) 161, at p. 170.

C. A. 1914

STOKER AND MORPETH CORPORATION'S ARBITRATION, *In re.*

Buckley L.J.

the Public Health Act, 1875"; that is to say, that the whole length of 240 feet is a "street." He has declared as a fact "that the portion of such street forming the subject of this reference is not repairable by the inhabitants at large." Neither the one nor the other of those two questions was within his jurisdiction to determine. They were questions for another tribunal. Then he finds "that the cost of making it up under s. 150 is properly payable by the owners of premises fronting, adjoining or abutting on such street." That is consequential on his previous findings. Lastly, he finds "that Mr. Stoker is the owner of property fronting, adjoining or abutting on the said street to the extent of 112 feet and 10 inches including the gateway." It was never disputed that Stoker's property fronted on the yard to that extent. The arbitrator by that finding is determining that Stoker had a frontage of 112 feet 10 inches upon a place which was a "street" within the meaning of s. 150 of the Act and was not repairable by the inhabitants at large. As I have said, those are not matters within his jurisdiction to determine. His award to that extent is bad. Then he goes on to "award and determine that the contribution payable by Mr. Stoker in respect of his premises is 19*l.* 16*s.* 3*d.*"

It has been contended that the part of the award in which the arbitrator finds facts does not matter; that in finding them he was only guiding himself in the conclusion he ought to arrive at; that he is merely stating in his award that Stoker's contribution is 19*l.* 16*s.* 3*d.*, a matter which is within his jurisdiction, as it is for him to determine the proper apportionment of the total expenses. I read the award as meaning this: "I award and determine that the contribution payable by Mr. Stoker in respect of his premises is 19*l.* 16*s.* 3*d.*, because he is a frontager upon 112 feet 10 inches of that which is a 'street' within the Public Health Act, 1875." That was not for him to determine. This view of the award is confirmed by the fact that the arbitrator directed Stoker to pay the costs of the arbitration and award. He must have heard evidence upon the question whether the yard was a "street," as he could not have found it without evidence. Therefore he must have heard evidence on questions

which he had no jurisdiction to determine, and he has made Stoker pay all the costs presumably upon the ground that Stoker was wrong upon those questions. The award therefore is in excess of the jurisdiction of the arbitrator. I agree with the decision of the Divisional Court.

I may add that the limits of the arbitrator's jurisdiction are clear, and they have not been disputed before us. Under s. 150 of the Public Health Act, 1875, the expenses of paving and making up a street not repairable by the inhabitants at large may be recovered by the urban authority from the frontagers "in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act." The arbitrator is the mere substitute of the surveyor to determine in case of dispute that which the surveyor would have finally decided in a case where there was no dispute. The limits of the authority of the surveyor are the limits of the authority of the arbitrator. The arbitrator has only to deal with questions of measurement and frontage and the like, a duty of a very humble nature. Upon this ground the appeal fails.

Another contention was raised upon which I feel bound to express an opinion, and upon this also in my opinion the appeal fails. The corporation having on February 11, 1914, served on Stoker notice of the appointment of their arbitrator, Stoker thirteen days later, that is on February 24, withdrew his notice of November 28, 1913, disputing the apportionment. In my opinion the result was that after that was done there could be no arbitration, as there was nothing upon which to arbitrate. The arbitration takes its rise from a notice of dispute given under s. 257. That notice starts the machinery of arbitration. Sect. 150 says that in case of dispute as to the apportionment there shall be an arbitration in manner provided by the Act. By s. 179, in case of dispute, unless both parties concur in the appointment of a single arbitrator, each party is to appoint an arbitrator. By s. 180, sub-s. 2, "Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same." When the corporation on February 11 appointed their arbitrator and delivered

C. A. 1914

STOKER AND MORPETH CORPORATION'S ARBITRATION, *In re.*

Buckley L.J.

the appointment to Stoker that was their submission to arbitration. I have next to see whether there was a submission to arbitration by Stoker. Sub-s. 4 says: "If for the space of fourteen days after any matter by this Act authorised or directed to be settled by arbitration has arisen, and notice in writing by one party who has duly appointed an arbitrator has been given to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom the notice is given fails to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties." If Stoker had not on February 24 withdrawn his notice of dispute the result would have been that at the expiration of the fourteen days the arbitrator appointed by the corporation would have been deemed to have been appointed by and to act on behalf of both parties. To make the sub-section intelligible it must be read as saying that the failure within the fourteen days to appoint an arbitrator shall operate as a submission by the party so failing to appoint. Therefore the machinery is this. A party either appoints his arbitrator, and in that case under sub-s. 2 that is his submission to arbitration, or he fails within the proper time to appoint an arbitrator, in which case the arbitrator appointed by the other party becomes his arbitrator as well and that is his submission to arbitration. Neither of these two events happened before Stoker withdrew his notice of dispute. There never was a time at which it was his duty to appoint an arbitrator, if the withdrawal of his notice of dispute brought the matter to an end. The expiration of the fourteen days did not create a constructive or statutory submission to arbitration. There is no submission on his part to arbitration.

It is said that, when Stoker gave the notice of dispute under s. 257, inasmuch as the Act says that there shall then be an arbitration, he has submitted to arbitration; that he has started the machinery of a statutory arbitration. In my opinion that is not correct and for this reason. When a party gives a notice of dispute he starts a statutory arbitration "in manner provided by this Act." That refers to s. 180, and under that section there must be a submission to arbitration. The corporation have

made their submission. Stoker never made his submission, and before the date when a default to appoint an arbitrator would have resulted in a constructive submission he withdrew his notice of dispute. It seems to me that at that moment, although one party had submitted to arbitration, the other had not. Stoker had then said in effect that there was nothing to arbitrate upon, as his case rested upon a question of law which was not the subject of arbitration. His notice of withdrawal was an effectual notice, and after that date there was nothing to arbitrate upon. The so-called arbitrator was therefore not an arbitrator, and his award is of no validity.

On both grounds therefore the award is invalid and ought to be set aside. The appeal fails and must be dismissed.

PHILLIMORE L.J. I am of the same opinion. It seems to me that if Stoker merely intended to dispute his proportion of the total cost of paving and making up the road, the only way he could do so was by going to arbitration. I do not decide it, but my present view is that his proportion is fixed at 19*l.* 16*s.* 3*d.* out of a total sum of 97*l.* 14*s.* That question is not before us. I have after some hesitation come to the conclusion that there was no power to proceed to arbitration and that therefore there is no valid award. I agree with Buckley L.J., though for some time I took a different view, that sub-ss. 2 and 3 of s. 180 taken together mean this, that a person who has appointed his arbitrator has submitted to arbitration, and that when once he has made the appointment he cannot revoke his submission without the consent of the other side. The words in sub-s. 3, "without the consent of both parties," are awkward, but they may fairly be said to mean without the consent of the other side. Therefore sub-s. 3 means that when one party has appointed an arbitrator he cannot revoke the appointment without the consent of the other party; and by sub-s. 4 if after the lapse of fourteen days the other party has not appointed an arbitrator he becomes bound and the arbitrator so appointed acts for both parties, unless before the expiration of the fourteen days the party who has not appointed an arbitrator has withdrawn his notice of dispute. I have come to the conclusion that Stoker had power to withdraw

C. A. 1914

STOKER AND MORPETH CORPORATION'S ARBITRATION, *In re.*

his notice of dispute, and I take the view that his letter of February 24 was a sufficient withdrawal to deprive the corporation of their right to proceed with the arbitration. The award was therefore of no validity, and the apportionment was left as it had been made. This is sufficient to dispose of the case, but I ought to deal with the other point.

Phillimore L.J.

Stoker is contesting the length of the street and consequently the length of his frontage. It seems to me that for the purpose of determining what the frontage is the arbitrator has either to assume or to determine, at any rate provisionally, what the street is, because the disputed part of the frontage is on that part of the yard as to which there is a dispute whether it is or is not a street. He has therefore to determine, at any rate provisionally,—whether finally or not I do not profess to say, though I am not sure that he does not determine it finally,—what Stoker's proportion is. But I agree that he professed to do more than this. He professed to determine that all notices had been duly served; that the yard was a street within the meaning of s. 4 of the Public Health Act, 1875; that it was not repairable by the inhabitants at large; and that Stoker was the owner of property fronting the street. Although it may be that none of these matters were seriously in dispute before him, they may have involved proof and must have involved costs.

Perhaps so far as this matter is concerned it is more a question of discretion than of law. There are cases where awards which determined immaterial points have been upheld. But here I think that there were so many unnecessary points the arbitrator professed to determine, some of which may embarrass Stoker in other proceedings, and the costs may have been so largely inflated, that it is right to say that, assuming that the arbitrator had jurisdiction to make an award, this award should be set aside.

Pickford L.J. I am of the same opinion. The first objection to the award is that any power to arbitrate had gone by reason of the withdrawal by Stoker of his objection to the apportionment which alone gave rise to the arbitration. It is said that the withdrawal was ineffectual as it was after the corporation had

appointed their arbitrator, and that therefore there was a submission which could not be revoked except by the consent of both parties. This depends upon the construction to be placed upon s. 180 of the Public Health Act, 1875. [The Lord Justice read sub-ss. 2, 3, and 4.] It seems to me that there is not a submission by both parties until one or other of two events has happened. Either each party has appointed an arbitrator, or one party has appointed an arbitrator and given notice of the appointment to the other party, and the latter has failed within fourteen days to appoint an arbitrator. Until one or other of those events has happened it seems to me that there is only a submission by one party and not by the other, and that the latter is at liberty to withdraw. I think that Stoker did withdraw his notice of dispute, and that therefore there was no subject-matter upon which an arbitration could be held.

I think it is as well to dispose also of the other point, namely, assuming that the arbitration could take place, whether there was an excess of jurisdiction on the part of the arbitrator. In my opinion there was. The award is a remarkable one. After certain recitals the arbitrator made and published his award wherein he declared six findings of fact, of which those numbered 3, 4, and 6 are the three important ones to consider. He then goes on to say: "I now do award and determine that (1.) The contribution payable by Mr. Stoker in respect of his premises is 19*l.* 16*s.* 3*d.*" It is said that he did not mean to make those six findings of fact part of his award, but that they were simply matter which he took into consideration in making his final award as to the apportionment. I can only say that that is not what he says. He says: "I do make and publish this my award in writing of and concerning the said matters as follows, that is to say," and then he sets out his six findings of fact. It is admitted that he had no jurisdiction to make an award on those matters, but it is said that he had a right to take them into consideration as matters incidental to and necessary for the formation of his opinion as to the apportionment. I will assume that was so, but he has gone much further. He has made an award determining those matters as facts, and in doing so he has, in my opinion, exceeded his jurisdiction. It is no

C. A. 1914

STOKER AND MORPETH CORPORATION'S ARBITRATION, *In re.*

Pickford L.J.

answer to say that it does not affect any one; that those findings can be disregarded in any other proceeding. It is obvious that Stoker may be considerably embarrassed by such findings. In any case he is entitled to say that those findings are in excess of the arbitrator's jurisdiction and that the award must be set aside. It is made more plain by the fact, which my Lord has mentioned, that the arbitrator heard evidence as to whether or not this was a "street," and whether or not it was repairable by the inhabitants at large, and having done that he made Stoker pay all the costs of the inquiry which were absolutely unnecessary. This seems to me to show that the arbitrator considered that he was the tribunal to decide those matters. Therefore I think that on both grounds the appeal fails.

Appeal dismissed.

Solicitors for the corporation: *Milner & Bickford, for Thomas D. Shaw, Morpeth.*

Solicitors for Stoker: *E. Flux, Leadbitter & Neighbour, for Charles Alderson, Morpeth.*

W. F. B.

1915
April 13.

In re GERSHON AND LEVY.
Ex parte COOTE & RICHARDS.
Ex parte WESTCOTT & SONS.

Bankruptcy—Partnership—Judgment for Dissolution in Chancery Action—Receiver—Order to pay Taxed Costs out of Partnership Assets—Equitable Charge — Pending Bankruptcy Petitions against Partners — Notice — Adjudication—Relation back of Trustee's Title—Invalid Charge—Secured Creditor—Protected "Transaction"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 7, 37, 40, 45, 167.

In February, 1914, judgment for dissolution of a partnership was given in an action in the Chancery Division and a receiver of the partnership assets was appointed. On June 16 an order was made by consent in the action to tax the costs of the plaintiff and of the defendant, and the receiver was ordered to pay the costs when taxed to the solicitors of the plaintiff and of the defendant out of the partnership assets. When this order was made all parties to it knew that a creditor's petition in bankruptcy was pending against each of the partners. Subsequently a receiving order was made on each petition, adjudication followed, the proceedings under the two petitions were consolidated, and an order was made by the judge in bankruptcy transferring the Chancery action to the Bankruptcy Court and staying the proceedings thereunder. In the meantime the costs had been taxed under the order of June 16 and the solicitors claimed that by virtue of that order they had an equitable charge for their costs on the partnership assets and were secured creditors :—

Held, that under the doctrine of relation back the title of the trustee in bankruptcy accrued prior to the order of June 16, which did not bind him nor oust his title.

Held, also, that the solicitors were not secured creditors, for that they knew of the bankruptcy petitions when the order was made, and therefore the assumption was that they had notice of an available act of bankruptcy committed by the partners before that time.

But *semble*, the order would have been a protected "transaction" within s. 45 of the Bankruptcy Act, 1914, if the solicitors had not had notice of an available act of bankruptcy.

THESE were two motions which by consent were heard together, and raised questions of priorities and also whether the applicants were respectively secured creditors of the debtors under these circumstances.

The debtors J. Gershon and H. Levy carried on business in co-partnership under the style of H. Levy & Co., and on

S

1915

GERSHON AND LEVY, *In re.*
COOTE & RICHARDS, *Ex parte.*
WESTCOTT & SONS, *Ex parte.*

February 24, 1914, Gershon issued a writ in the Chancery Division against Levy for dissolution of the partnership and consequential relief, and on February 27, 1914, on a motion by Gershon for a receiver, judgment was taken by consent for dissolution of the partnership as from the date of the writ, and one Olive was appointed receiver and manager of the partnership business with usual directions.

On April 22, 1914, Coote & Richards, who were judgment creditors of the debtors, obtained an order in the Chancery action giving them a charge on the partnership assets for 40*l.* 15*s.* 4*d.*, being the amount of their judgment debt and costs. This charge was in the common form based on *Kewney* v. *Attrill.* (1)

In May, 1914, Levy launched a motion in the Chancery action to remove Olive as receiver for alleged misconduct, and eventually on June 16 an order was made in the action by Joyce J., all parties consenting, whereby it was (amongst other things) ordered that a fit and proper person should be appointed receiver and manager of the partnership business in the place of Olive, who desired to be discharged, he consenting to act until his successor was appointed. And it was ordered that the costs of the plaintiff and defendant should be taxed and that the said costs when taxed should be paid forthwith out of the assets of the partnership by the receiver Olive or his successor as receiver in the action or other the person having the possession of the said assets to the solicitors for the said respective parties, and that such payments should be allowed in the receiver's or such other person's next account.

In the meantime, on April 17, 1914, a creditor's petition in bankruptcy had been presented against Gershon, on which a receiving order was made on May 29 following; and on April 23, 1914, a creditor's petition in bankruptcy had been presented against Levy, on which a receiving order was made on June 19 following. On July 15, 1914, Gershon and Levy were respectively adjudicated bankrupt, and the proceedings under the two bankruptcy petitions were consolidated.

The fact that these two bankruptcy petitions were pending when the order of June 16, 1914, was made in the Chancery

(1) (1886) 34 Ch. D. 345.

action was known to the parties to that order and to their respective solicitors at that time.

On July 16, 1914, Horridge J., on the application of the trustee in bankruptcy, made an order whereby the Chancery action of *Gershon* v. *Levy* was transferred to the Bankruptcy Court and further proceedings thereunder were stayed, and the receiver (Olive) was discharged and ordered forthwith to give up possession of the debtors' property to the trustee and to bring in and pass his account before one of the registrars in bankruptcy, who should also fix the amount of his remuneration. Under this order the registrar fixed the receiver's remuneration at 10*l.*, without prejudice to the question whether the remuneration was to be allowed.

In the meanwhile taxation of costs had proceeded under the order of June 16, 1914, and the costs of Westcott & Sons, the solicitors for the plaintiff Gershon, were taxed and allowed at 148*l.* 12*s.* 6*d.*, and the costs of Coote & Richards, the solicitors for the defendant Levy, were taxed and allowed at 234*l.* 19*s.* 5*d.*

On February 3, 1915, Coote & Richards served the trustee in bankruptcy with a notice of motion for an order that he should pay them out of the partnership moneys in his hands (1.) the 40*l.* 15*s.* 4*d.* to which they were entitled under the order of April 22, 1914; and (2.) the sum of 234*l.* 19*s.* 5*d.*, being the amount of their taxed costs under the order of June 16, 1914.

On March 3, 1915, Westcott & Sons served the trustee and Coote & Richards with a notice of motion for an order that the trustee should pay them out of the partnership moneys in his hands the sum of 148*l.* 12*s.* 6*d.*, being the amount of their taxed costs under the order of June 16, 1914; and on the same day Olive served the trustee with a notice of motion for payment of his remuneration as receiver out of the partnership moneys.

The moneys in the hands of the trustee amounted to 425*l.* 19*s.* 10*d.*, and were therefore insufficient to meet those claims, and a question of priorities (amongst others) arose.

On April 13, 1915, the three motions came on for hearing, and it was arranged that they should be taken together. The motion by the receiver does not call for a report.

1915

GERSHON AND LEVY, *In re.*
COOTE & RICHARDS, *Ex parte.*
WESTCOTT & SONS, *Ex parte.*

A. Beddall, for Coote & Richards. In the first place, under the order of April 22, 1914, we are entitled to be paid 40*l.* 15*s.* 4*d.* out of the assets in priority to all other claims.

E. W. Hansell, for the trustee. On the authorities I must admit that Mr. Beddall's clients have a valid charge for 40*l.* 15*s.* 4*d.* But there is another judgment creditor, one Hill, who obtained a similar charge for 57*l.* 17*s.* 8*d.* on March 30, 1914, and has priority over them.

A. Beddall. I admit Hill's priority.

Tindale Davis, for Westcott & Sons. I admit the priority of Hill and of Coote & Richards as to these two sums.

A. Beddall. The next question is as to the taxed costs of Coote & Richards under the order of June 16, 1914. That order directs the receiver to pay the taxed costs "out of the partnership assets," and gave us an equitable charge and made us secured creditors: *Rodick* v. *Gandell.* (1) It was a consent order by way of compromise and gave the plaintiff no priority for his costs. If the balance of the assets is insufficient to pay the two sets of costs they must abate rateably. But it may be conceded that the receiver, if he is entitled to his remuneration, will have a prior claim.

Tindale Davis, for Westcott & Sons, adopted the same line of argument.

E. W. Hansell, for the trustee. A partner can have no charge or lien on the partnership assets until all the partnership debts and liabilities have been paid: *Mycock* v. *Beatson.* (2) On the language of the order itself, it created no charge. It was only a direction to pay costs and was in the nature of an incomplete equitable execution: *In re Potts* (3); Bankruptcy Act, 1914, s. 40. A secured creditor is defined in s. 167 of the Act, and his rights are preserved by s. 7. If it was a charge, it was subject to the supervening bankruptcy of the partners, and by virtue of s. 37 of the Act the title of the trustee related back to a period before the date of the bankruptcy petitions. His title therefore accrued before the order was made, and he was no party to it and was not bound by it. The onus is on the applicants to prove that they had no notice of an available act of bankruptcy committed by

(1) (1851) 1 D. M. & G. 763, 777. (2) (1879) 13 Ch. D. 384.
(3) [1893] 1 Q. B. 648.

1915

GERSHON AND LEVY, *In re.*
COOTE & RICHARDS, *Ex parte.*
WESTCOTT & SONS, *Ex parte.*

the partners when the order was made. But they knew of the pending bankruptcy petitions, and therefore the assumption is that they had notice of an available act of bankruptcy. The order is not a protected transaction within s. 45 of the Act.

A. Beddall in reply. It is submitted that the real question is whether the Chancery Court had jurisdiction to make the order. Under the judgment for dissolution of the partnership that Court took possession of all the partnership assets, and the partners' interests were only the balance (if any) after all the costs of administration had been paid. That Court had power to deal with the assets in due course of administration and to direct their application by the order of June 16, including costs. As long as that order stands it is valid and binds the property. All proper parties were before the Court when the order was made, and it is submitted that the Bankruptcy Court cannot now overreach that order.

Tindale Davis in reply in the same interest.

HORRIDGE J. dealt first with the motion of the receiver and held that he had been guilty of a gross dereliction of duty and was not entitled to any remuneration, and dismissed his motion with costs, and continued: I come now to the two cases in which judgment creditors of the partnership asked for leave to levy execution on the partnership assets after the receiver was appointed in the Chancery action, and the Court made the usual orders giving them a charge and putting them in the same position as if they had levied execution. The first is Mr. Hill, who obtained his charging order on March 30, 1914. He is not a party to the present application, but I have enough evidence before me to say that his 57*l.* 17*s.* 8*d.* must come first out of the assets. Then comes the charge of April 22, 1914, in favour of Messrs. Coote & Richards for 40*l.* 15*s.* 4*d.* The trustee in bankruptcy must pay both those sums out of the assets in his hands in priority to any other payments.

There remains to be considered the question of the two sets of taxed costs of the solicitors of the parties in the partnership action in the Chancery Division. Whilst that action was going on, there was a motion by the defendant Levy before Joyce J.

1915

GERSHON AND LEVY, *In re.*
COOTE & RICHARDS, *Ex parte.*
WESTCOTT & SONS, *Ex parte.*

Horridge J.

to remove the receiver on grounds which are not before me, and on June 16, 1914, an order was made by Joyce J. with the consent of all parties. It was in effect an agreement or compromise. [His Lordship read the order.] Now the first question is, did that order give an equitable charge in favour of the solicitors on the moneys in the hands of the receiver? A creditor in order to have priority over other creditors must be a secured creditor. Sect. 7 of the Act provides that a receiving order shall not affect the right of a secured creditor to realize or otherwise deal with his security, and s. 167 defines "secured creditor" to mean "a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." Mr. Hansell referred me to *In re Potts.* (1) In that case judgment creditors of a debtor had obtained ex parte the appointment of a receiver to receive moneys to which the debtor was entitled under the will of his mother, and Vaughan Williams J. and the Court of Appeal held that the judgment creditors were not secured creditors. There was nothing in the order that directed the executors of the mother to pay the money to the receiver and they were not parties to the order, or, as Lindley L.J. puts it in his judgment at p. 661, it was "simply an uncompleted process to obtain payment of money." Here, however, I find that Joyce J. has made an order directing the receiver to pay these costs when taxed out of the moneys in his hands, and that I think created an equitable charge. I think therefore that, but for the doctrine of relation back, these solicitors were secured creditors and entitled to priority over other creditors because all necessary parties were before the Court when the order was made. But it is said that they are not entitled to priority for the following reason. At the time the order was made, although the proper parties were before the Court and there was no adjudication in bankruptcy, a petition in bankruptcy was pending against each of the debtors on which receiving orders were ultimately made followed by adjudication, and the title of the trustee in bankruptcy related back to a period anterior to the date of the order. When the order was made there was a prior available act of bankruptcy committed by each

(1) [1893] 1 Q. B. 648.

1915

GERSHON AND LEVY, *In re.*
COOTE & RICHARDS, *Ex parte.*
WESTCOTT & SONS, *Ex parte.*

Horridge J.

of the debtors within the statutory period of three months. There is no evidence that either of the present applicants was in ignorance of the bankruptcy petitions, and the onus is on them to prove they had no knowledge of any available act of bankruptcy committed by the debtors before the order was made. On the contrary it is admitted in the arguments before the Court of Chancery that both petitions were referred to, so that Court itself had notice of the bankruptcy proceedings when the order was made. Then what is the result of the relation back of the trustee's title? It is that, owing to the relation back, the parties to the order were not the proper parties and could not validly consent to it. When the adjudication took place the Chancery Court had purported to deal with property which was the property of the trustee. But he was no party to the order and could not possibly be bound by it, and it had no effect upon him. Of course, if it could have been shown that the order came within the protection of s. 45 of the Act and the applicants had no notice of any available act of bankruptcy, it would have been a different matter and the trustee's title would have been ousted, because I think the order was in effect a "dealing or transaction" within the meaning of this section. In this case that has not been shown and the trustee's title has not been ousted. I hold the applicants are not secured creditors as regards these two sets of costs.

Solicitors: *Coote & Richards; Westcott & Sons; Wilkinson, Howlett & Wilkinson.*

H. L. F.

1915
April 14.

In re CARILL-WORSLEY.

Bankruptcy—Practice—Motion—Evidence — Notice to read Deposition on the File—Supplying Copy to Respondent — Costs — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 27—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 25—*Bankruptcy Rules*, 1915, *r.* 12.

On any motion where notice is given to use in evidence against the respondent on the hearing of the motion the deposition on the file of a person examined under s. 25 of the Bankruptcy Act, 1914, the respondent, if he applies for it, should be supplied with a copy of the deposition on paying the usual charges. Afterwards it will be for the taxing Master, on taxing the costs of the motion, to decide whether the costs of such a copy should be allowed to the successful party.

This was an application that raised a question of practice with regard to depositions on the file in these circumstances.

In December, 1912, the debtor became bankrupt. In 1913 Charles Sandford, Limited, registered money-lenders, claiming to be creditors of the debtor, lodged a proof against his estate for 287*l.* 9*s.* 10*d.*, which was admitted by the trustee. Subsequently the trustee, on information obtained from the debtor, caused Scott, the secretary of the company, and Chapman, a director of the company, to be examined under s. 27 of the Bankruptcy Act, 1883 (reproduced in s. 25 of the Bankruptcy Act, 1914), and now moved to expunge the proof on the ground that it ought not to have been admitted. His notice of motion stated that the depositions of Scott and Chapman would be used in evidence against the respondent company at the hearing of the motion. The solicitor of the company applied to the trustee for copies of both depositions and offered to pay the usual charges. A copy of Scott's deposition was supplied, but the trustee declined to furnish a copy of Chapman's deposition.

The motion now came on for hearing.

E. W. Hansell, for the motion.

H. Simmons, for the company, objected that he could not conduct the defence without a copy of Chapman's deposition, and asked for an adjournment.

E. W. Hansell. Copies of the affidavits to be used are always served with the notice of motion, but since *In re Cooper* (1) it has not been the practice to supply copies of depositions.

[HORRIDGE J. It seems to me not unreasonable that if a respondent asks for a copy he should have it on paying for it.]

It might lead to unnecessary expense. Under r. 12 of the Bankruptcy Rules, 1915, he can inspect the file and take a copy for himself. In many cases the material portion of a deposition comprises only a few questions and answers.

HORRIDGE J. It seems to me that when notice is given to a respondent that depositions are going to be read against him on a motion it is reasonable to allow him to obtain from the solicitors for the applicant a copy of these depositions on his paying for it. This will be without prejudice to the question of whether or not the cost of it will be allowed on taxation. Without in any way interfering with *In re Cooper* (1), I think it will be convenient to lay down as a general rule of practice that on any motion, where notice is given to use in evidence against the respondent on the hearing of the motion the deposition of any person examined under s. 25 of the Bankruptcy Act, 1914, the respondent, if he applies for it, is entitled to be supplied with a copy of the deposition on paying the usual charges. Afterwards it will be for the taxing Master to decide, on taxing the costs of the motion, whether the costs of such a copy shall be allowed to the successful party, having special regard to the question of whether or not he could have otherwise obtained inspection of the deposition.

Solicitor for the trustee: *Isadore Goldman.*
Solicitor for the company: *G. R. Cran.*

(1) (1882) 19 Ch. D. 580, 587.

H. L. F.

C. A.
1915
Feb. 8, 9;
March 11.

[IN THE COURT OF APPEAL.]

GUARANTY TRUST COMPANY OF NEW YORK *v.* HANNAY & COMPANY.

[1914 G. 1661.]

Practice—Action claiming a Declaration—Where no Cause of Action exists—"Whether any consequential relief is or could be claimed or not"—Jurisdiction—Rules of the Supreme Court, 1883, *Order* XXV., *r.* 5.

By Order XXV., r. 5, "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not":—

Held by Pickford and Bankes L.JJ., Buckley L.J. dissenting, that the Court has power to make a declaration at the instance of a plaintiff though he has no cause of action against the defendant; and that the rule so construed is merely an extension of the practice and procedure of the Court, and is not ultra vires.

The defendants, who carried on business in Liverpool, purchased cotton from dealers in America, who drew a bill of exchange on the defendants for the price. The plaintiffs in New York (who had a branch office in London) in good faith purchased the bill of exchange with the bill of lading and insurance certificate attached thereto, and sent the documents to the defendants in Liverpool, who accepted the bill of exchange and returned it to the plaintiffs' London office. The defendants paid the bill at maturity. The bill of lading was a forgery, and no cotton had been shipped under it. The defendants brought an action against the plaintiffs in America to recover the amount of the bill so paid by them, and it was admitted that the law of England applied to the case. The plaintiffs thereupon brought an action in England claiming declarations to the effect that they did not by presenting the bill for acceptance with the bill of lading attached represent that the bill of lading was genuine, and that they were not bound to repay the amount of the bill. They also claimed an injunction to restrain the defendants from further proceeding with the action in the United States. The ground upon which the injunction was asked was that the proceedings in the United States were vexatious and likely to cause injustice and expense. Upon an application by the defendants under Order XXV., r. 4, to strike out the claim for the declarations upon the ground that they disclosed no cause of action:—

Held (Buckley L.J. dissenting), that the claim ought not to be struck out.

By Pickford L.J.: Order XXV., r. 5, is not confined to cases where the plaintiff has a cause of action apart from the rule; its effect is to

give a general power to make a declaration, whether there is a cause of action or not, at the instance of a party interested in the subject-matter of the declaration. A declaration, however, that a person is not liable in an existing or possible action is one which will hardly ever be made, though it is not beyond the power of the Court in a very exceptional case to make such a declaration.

By Bankes L.J.: The rule applies where a person is seeking relief or in whom a right to relief is alleged to exist, and his application for a declaration is not to be refused merely because he cannot establish a legal cause of action. "Relief" is not confined to relief in respect of a cause of action, and the claim for the injunction was a claim for relief to which the claim for the declaration was merely ancillary.

By Buckley L.J.: A declaration can only be made under Order XXV., r. 5, where it is founded on facts which, if true, show a cause of action. The rule does not authorize a declaration as to the plaintiff's obligation, where the cause of action is in the defendant and not in the plaintiff. The declarations claimed did not lead to or bear upon the injunction, which was an entirely separate matter.

Decision of Bailhache J. [1915] W. N. 38 affirmed.

APPEAL from an order of Bailhache J. in chambers. (1)

The plaintiffs were a banking corporation carrying on business in New York, and having a branch office in London, and they did a large business in buying, selling, and discounting foreign bills of exchange. The defendants carried on business in Liverpool as dealers in cotton.

At the end of 1909 and beginning of 1910 the defendants made through brokers on the Liverpool Cotton Exchange purchases of cotton from a firm carrying on business as dealers in cotton in Alabama, United States of America. In order to receive payment for the cotton so sold the usual course of business was for the American sellers upon shipment to draw a bill of exchange either upon the actual buyers or by the buyers' direction upon banks with whom the buyers arranged for their acceptance. In accordance with that course of business the sellers in America drew a number of bills of exchange for the purchases of cotton in question, either on the defendants or on their banks in Liverpool, and in each case the sellers attached to the bill of exchange relating to the particular shipment what purported to be the bill of lading and insurance certificate relating thereto. The bills of exchange so drawn and the attached

(1) [1915] W. N. 38.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

documents were sold in New York through brokers there by the sellers of the cotton to the plaintiffs, who paid full current value for the same and received the bills of exchange and the attached documents. The plaintiffs throughout acted in good faith and without any knowledge or suspicion that the attached documents were other than what they purported to be. Upon receipt of the bills of exchange with the documents attached the plaintiffs sent them to the drawees in Liverpool, who accepted the bills of exchange and returned them to the plaintiffs at their office in London, and retained the attached documents. The plaintiffs, upon receipt of the accepted bills, negotiated them in England by way of discount, and the bills were duly paid at maturity by the defendants, or by their bankers on their behalf. It turned out that many of the bills of lading were forgeries, and that no cotton had in fact been shipped under them. In respect of one of these bills of exchange for 1464*l.* 9*s.*, which had been accepted by the defendants' bankers in Liverpool on behalf of and paid by the defendants, the latter on January 23, 1911, brought an action against the plaintiffs in the United States Circuit Court for the southern district of New York to recover the 1464*l.* 9*s.* so paid by the defendants. It was admitted that the case was governed by the law of England. The Court gave judgment for the present defendants (the plaintiffs in that action), but the United States Court of Appeals ordered a new trial.

While the new trial was pending, the plaintiffs on October 12, 1914, commenced the present action in the King's Bench Division, the claim indorsed on the writ being as follows:—

"(1.) A declaration that the plaintiffs are not liable to repay to the defendants any sums paid by them in respect of any of a number of bills of exchange drawn by" the sellers of the cotton in America "on the defendants, the Bank of Liverpool, Limited, and the London City and Midland Bank, Limited, and accepted by the drawees, particulars whereof so far as known to the plaintiffs are as follows": Then followed a list of six bills accepted by the Bank of Liverpool on February 10, 1910, four accepted by the London City and Midland Bank on February 21, 1910, and six accepted by the defendants on February 24, 1910, one of the bills accepted by the Bank of

Liverpool being that on which the defendants sued in the United States.

"(2.) A declaration that the plaintiffs did not by presenting the said bills for acceptance with bills of lading attached or by indorsing the said bills warrant or represent that the said bills of lading were genuine or that the cotton therein described and referred to in the said bills of exchange had been shipped.

"(3.) A declaration that all the said bills accepted by, on behalf, or on account of the defendants were unconditionally accepted.

"(4.) An injunction to restrain the defendants from further prosecuting or taking any further step in an action commenced by the defendants against the plaintiffs in the United States District Court for the southern district of New York on the 23rd January, 1911, to recover the aforesaid sum of 1464*l.* 9*s.* and interest.

"(5.) An injunction to restrain the defendants from instituting or prosecuting any proceedings against the plaintiffs to recover any moneys paid by the defendants in respect of the aforesaid bills or any of them in any foreign Court.

"(6.) Payment of the costs incurred by the plaintiffs in and in respect of the above-mentioned action in America or such part thereof as the Court may think fit."

The action was transferred to the commercial list. The plaintiffs took out a summons before Bailhache J. for an interim injunction in the terms stated in paragraphs 4 and 5 in the indorsement on the writ, upon the ground that the action in America was vexatious and embarrassing and likely to cause injustice to the plaintiffs and expense and that the English Courts could better decide the English law. The learned judge intimated that he was not prepared to grant an interim injunction, and upon the defendants' counsel stating that they intended to raise the point that the Court had no jurisdiction to make the declarations claimed in paragraphs 1 to 3 in the indorsement on the writ, the claim for an injunction stood over, and it was agreed that the case should be argued upon the footing that the defendants had taken out a summons under Order xxv., r. 4, that the claim for the declarations in

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

paragraphs 1 to 3 in the indorsement on the writ should be struck out. Bailhache J. held that he had jurisdiction to entertain the claim for the declarations, and dismissed the summons. (1)

The defendants by leave appealed.

F. A. Greer, K.C., and *A. R. Kennedy*, for the defendants. The declaration which the plaintiffs ask for by the indorsement on the writ is a declaration that they are not liable to repay to the defendants the amount of the bills of exchange. Such a declaration is not authorized by Order xxv., r. 5. The defendants are entitled to have the three paragraphs of the indorsement on the writ claiming declarations (which is to be taken for this purpose as the statement of claim) struck out on the ground that they disclose no cause of action, the only cause of action alleged being the right to the declarations. The Court of Chancery before the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), had no power to make a declaration of right where no other relief was claimed. Sect. 50 of that Act provided that "no suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief." That section was held only to apply to cases in which there was a right to some equitable relief which might be granted if the plaintiff chose to ask for it: *Rooke* v. *Lord Kensington*. (2) It did not empower the Court to make a mere declaration of right where consequential relief was neither asked for nor could be obtained. Since the Judicature Acts the Court has no greater jurisdiction in this respect. The Courts of this country are open to suitors who have some cause of complaint. The plaintiffs here have no cause of complaint; they are merely asking for a declaration that the defendants have no cause of action against them. Instead of waiting until they are sued and then setting up their defence, they seek to reverse the position of the parties and to make the defendants litigate their cause of action in a forum not of their own choosing. The Judicature Acts and Rules give them no such right. Sect. 16 of the Judicature Act, 1873 (36 &

(1) [1915] W. N. 38.

(2) (1856) 2 K. & J. 753, at pp. 760, 761.

37 Vict. c. 66), transferred to the High Court the jurisdiction of the Court of Chancery ; and by s. 23 the jurisdiction transferred to the High Court is to be exercised (so far as regards procedure and practice) in the manner provided by the Act and Rules, and where no special provision is contained in the Act or Rules as nearly as may be in the same manner as before. Sect. 17 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), gives power to make rules regulating the practice and procedure of the Court. Order xxv., r. 5, deals with proceedings in lieu of demurrer. Under r. 4, unless the statement of claim discloses a reasonable cause of action, it may be struck out. Rule 5 says that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby." That refers to an action or proceeding which the plaintiff has a right to bring, and which is properly constituted independently of the rule. A declaration will not be made where there is no right to consequential relief: *Brooking* v. *Maudslay, Son & Field.* (1) The argument for the defendants in that case was (see p. 641) that "the Court will not make a declaration unless relief can follow upon it," and this argument was adopted by Stirling J. The case of *London Association of Shipowners* v. *London and India Docks Committee* (2), which is relied upon by the plaintiffs, does not support their right to the declarations claimed. In that case the plaintiffs, the Peninsular and Oriental Steam Navigation Company, complained that the defendants by means of regulations threatened to interfere with the use of berths appropriated to the plaintiffs, and they brought an action for an injunction and a declaration that the regulations were invalid. The Court held that, though no right of the plaintiffs had actually been infringed, they could make a declaration under Order xxv., r. 5, that the regulations were not binding upon the plaintiffs. There, however, there were both an intention and a threat by means of the regulations to interfere with the plaintiffs' rights, and a case for an injunction was made out. In *Barraclough* v. *Brown* (3) it was held that, where a statute gave a right to recover expenses in a Court of summary jurisdiction from a person who was not

(1) (1888) 38 Ch. D. 636, at pp. 646, 647. (2) [1892] 3 Ch. 242.
(3) [1897] A. C. 615.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

otherwise liable, the High Court had no power to make a declaration that the applicant had a right to recover the expenses in a Court of summary jurisdiction, upon the ground that the High Court could give no relief. Lord Davey (at p. 624) referred to *London Association of Shipowners* v. *London and India Docks Committee* (1) as a case similar to that in which a declaration was sought as to future or reversionary rights. As Lord Davey said, "it would obviously be incompetent for the judges or the Rule Committee under a power to make rules of procedure to give the Court power to deal with a matter which is outside its jurisdiction. The rule relates to procedure only, and must be so construed." Rules of practice cannot affect substantive rights. If the rule, upon its true construction, gives power to make a declaration where no relief can be given it is ultra vires. The Court will not so construe it. *Chapman* v. *Michaelson* (2) was a very different case from the present. There the trustee of a debtor under a scheme of arrangement with his creditors brought an action against an unregistered money-lender, who had taken a mortgage from the debtor to secure a loan, for a declaration that the mortgage was illegal under s. 2 of the Money-lenders Act, 1900. The debtor was liable on the mortgage, and the plaintiff was desirous of having the validity of the mortgage decided for the purpose of administering the property of which he was the trustee under the scheme.

Bailhache J. placed reliance on *The Manar* (3), but there both the plaintiffs and defendants were making claims against the ship and to settle those claims the Court made a declaration. In *Williams* v. *North's Navigation Collieries* (4) Collins M.R. was of opinion that a declaration could not be made where it would not be ancillary to the putting in suit of a legal right—a dictum which is not affected by the reversal of the decision in the House of Lords (5)—and Joyce J. in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (6) and Warrington J. in *Offin* v. *Rochford*

(1) [1892] 3 Ch. 242.

(2) [1908] 2 Ch. 612; [1909] 1 Ch. 238.

(3) [1903] P. 95; further reported on the trial of the action in 89 L. T. 218.

(4) [1904] 2 K. B. 44, at p. 49.

(5) [1906] A. C. 136.

(6) [1906] 1 Ch. 324; affirmed [1906] 2 Ch. 498.

Rural Council (1) expressed the same opinion. In *Lofthouse Colliery* v. *Ogden* (2) Bailhache J. made a declaration as to the meaning of an award under the Coal Mines (Minimum Wage) Act, 1912, but that was a declaration as to the construction of a document, which comes within Order LIV.A, r. 1. The decision of Channell J. in *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (3) to the effect that the plaintiffs, who had no cause of action against the defendants, could claim a declaration under Order xxv., r. 5, is wrong. The order of Bailhache J. was therefore wrong, and the claims for the declarations should be struck out. [*Zinc Corporation* v. *Skipwith* (4) was also referred to.]

Duke, K.C., and *D. M. Hogg*, for the plaintiffs. Order xxv., r. 5, empowers the Court to make the declarations claimed. Before the Chancery Procedure Act, 1852, the Court of Chancery never made a simple declaration of right where the plaintiff was not entitled to any relief. In *Rooke* v. *Lord Kensington* (5) it was held that the Act of 1852 only empowered the Court of Chancery to make declarations of right without giving consequential relief in cases in which there was some equitable relief which might be granted if the plaintiff chose to ask for it. This view of the Act of 1852 has not met with universal approval. In *Cox* v. *Barker* (6) James L.J. said that "it was held that under the Act 15 & 16 Vict. c. 86 a plaintiff could not file a bill for a mere declaration unless there were some consequential relief which the Court had the power of giving. It appears to me that in those cases the Court adopted rather a narrow view, though certainly it would not have done to ask the Court to make a declaration upon mere abstract questions." In *Hope* v. *Hope* (7) Lord Cranworth L.C. made a declaration of English law for the benefit of a French Court. Order xxv., r. 5. which was passed in 1883, enables the Court to make declarations of law where the plaintiff is not entitled to or does not claim consequential relief. Where there is a dispute upon some question of

(1) [1906] 1 Ch. 342.
(2) [1913] 3 K. B. 120.
(3) (1904) 9 Com. Cas. 289.
(4) (1914) 31 Times L. R. 107.
(5) 2 K. & J. 753.
(6) (1876) 3 Ch. D. 359, at p. 370.
(7) (1854) 4 D. M. & G. 328, at pp. 354, 355.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

law in respect of which one party threatens to attack the other, the Court may upon the claim of the latter make a declaration as to the law. Rule 5 was intended to do away with the old decisions that the Court of Chancery had no power to make declarations of right where the plaintiff was not entitled to consequential relief. The language of the rule is clear. "The Court may make binding declarations of right whether any consequential relief is or could be claimed or not." Unless the rule means that a person who has no cause of action can obtain a declaration of right, it has no effect. It does not add anything to the power of the Court. Where a plaintiff had a cause of action the Court could always have made a declaration. "Consequential relief" means relief which is the consequence of the declaration. Rule 4 deals with the striking out of a pleading where no reasonable cause of action is disclosed. Rule 5 goes further and allows a declaration though no cause of action is disclosed. "Declaration of right" does not mean that the plaintiff must have a cause of action. It is not limited to a declaration of title or the like. It applies to all declarations of right where there is a dispute as to that right.

The authorities show that r. 5 has the meaning contended for by the plaintiffs. *Brooking* v. *Maudslay, Son & Field* (1) only shows that the Court will not make a declaration where there is no dispute or threatened dispute. In *London Association of Shipowners* v. *London and India Docks Committee* (2) the plaintiffs had no cause of action and yet the Court of Appeal made the declaration claimed. In *Barraclough* v. *Brown* (3) the jurisdiction of the High Court was excluded by statute, and therefore it was held that the High Court could not make a declaration. Lord Davey in that case accepted the decision in *London Association of Shipowners* v. *London and India Docks Committee* (2) as correct. In *Ellis* v. *Duke of Bedford* (4) Lindley M.R., referring to Order xxv., r. 5, said that "actions can be brought merely to declare rights, and this is an innovation of a very important kind." *The Manar* (5) is very like the present case and supports the plaintiffs' contention. In *Williams* v.

(1) 38 Ch. D. 636.
(2) [1892] 3 Ch. 242.
(3) [1897] A. C. 615.
(4) [1899] 1 Ch. 494, at p. 515.
(5) [1903] P. 95.

North's Navigation Collieries (1) the House of Lords made the declaration which the Court of Appeal (2) refused to make. In *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (3) Channell J. made a declaration in favour of a plaintiff who had no cause of action. In *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (4) Joyce J. treated the matter as discretionary. In *Dyson* v. *Attorney-General* (5), upon an application to strike out the statement of claim, which claimed a declaration, as disclosing no cause of action, Cozens-Hardy M.R. said (at p. 417) that the jurisdiction to make declarations was enlarged by Order xxv., r. 5; and Farwell L.J. said (at p. 422) that "declarations of right can now be obtained in cases where the Court of Chancery would have refused to make them." When the case was heard on appeal after the trial the Court held that it had jurisdiction to make a declaratory order against the Attorney-General as representing the Crown: *Dyson* v. *Attorney-General* (6); and in *Burghes* v. *Attorney-General* (7) Warrington J. made a similar order, and his decision was affirmed in the Court of Appeal. (8)

The rule so construed is not ultra vires. The Court of Chancery before the Chancery Procedure Act, 1852, never made a declaration of right where the plaintiff had no right to relief. This was not on the ground of want of jurisdiction in the strict sense of the term, but because the practice and procedure of the Court had become so stereotyped that the Court never made declarations in such cases. It never exercised its jurisdiction. Its procedure was not appropriate for the exercise of the jurisdiction. In this sense the Court had no jurisdiction or power to make such a declaration. It required a new rule of practice to enable the Court to do so. Order xxv., r. 5, merely enlarges the practice and procedure of the Court. It lays down when and how the Court may exercise its jurisdiction. It does not bring a new subject-matter within the jurisdiction of the Court; there was before the rule no want of jurisdiction. It does not deprive the

(1) [1906] A. C. 136.
(2) [1904] 2 K. B. 44.
(3) 9 Com. Cas. 289.
(4) [1906] 1 Ch. 324.
(5) [1911] 1 K. B. 410.
(6) [1912] 1 Ch. 158.
(7) [1911] 2 Ch. 139.
(8) [1912] 1 Ch. 173.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

defendant of any substantive right. Sect. 16 of the Judicature Act, 1873, transferred to the High Court the jurisdiction which "was vested in or capable of being exercised by" the Court of Chancery. Sect. 17 of the Judicature Act, 1875, gives power to make rules for regulating the practice and procedure of the Court, and the rules are to be laid before Parliament. Order xxv., r. 5, does not enlarge the jurisdiction of the Court; it merely facilitates the exercise of its jurisdiction as between parties who are disputing as to their rights. It is a most useful power, and the Court will endeavour to uphold it.

Further, if Order xxv., r. 5, is dependent upon a right to consequential relief, the claim for an injunction is a claim for consequential relief. The question of granting an interim injunction stands over and is not now before the Court, but the claim remains and may entitle the plaintiffs to relief. The order of Bailhache J. is therefore right.

F. A. Greer, K.C., in reply. Before the Judicature Act, 1873, these declarations could not have been made. The Judicature Act has only given to the High Court the jurisdiction which either the Court of Chancery or the Courts of common law had before; it has conferred no new right to relief: *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (1); *In re Mills' Estate*. (2) Before the Judicature Act the Court of Chancery could not have entertained a suit merely for a declaration of the plaintiff's obligation to the defendant. Such a proceeding is not a matter of procedure. It deprives the defendant of his right to bring his action in any appropriate Court he may select, and it creates a new cause of action which was not in existence before the Judicature Act, 1873. If Order xxv., r. 5, has the meaning contended for by the plaintiffs, it is ultra vires. In *Dyson* v. *Attorney-General* (3), *Dyson* v. *Attorney-General* (4), and *Burghes* v. *Attorney-General* (5) the plaintiff was threatened with penalties if he did not fill in a certain form, and he claimed that he was not under an obligation to fill it in. He might have claimed an injunction, and the declaration was made in an action in

(1) (1885) 30 Ch. D. 387.
(2) (1886) 34 Ch. D. 24, at p. 33.
(3) [1911] 1 K. B. 410.
(4) [1912] 1 Ch. 158.
(5) [1911] 2 Ch. 139; [1912] 1 Ch. 173.

hich he could have obtained a declaration under s. 50 of the Chancery Procedure Act, 1852. [*In re Hallett's Estate* (1) was also referred to.]

Cur. adv. vult.

March 11. BUCKLEY L.J. read the following judgment:—In the course of the discussion in this Court the appellants have limited themselves to asking that from the indorsement on the writ there should be struck out the three declarations therein contained, leaving paragraphs 4, 5, and 6, which ask for injunctions and payment of costs, as being, as in fact they are, a separate matter. The declarations do not lead to, and have no bearing upon, the injunctions. If the declarations, if granted, would lead to or bear upon the injunctions, my conclusion on this appeal would be different. But the fact is that they do not.

The question to be decided is whether a plaintiff can have a declaration in respect of a cause of action residing in the defendant and not in the plaintiff, or, in other words, whether a plaintiff who is under an obligation can as against a defendant to whom he owes its performance have a declaration delimiting the obligation. To put a concrete case exhibiting the matter in what may be thought an extravagant form: Will an action lie by a plaintiff who, upon allegations that he is indebted to the defendant for goods sold and delivered, and that the goods are not according to sample, claims a declaration to that effect and a declaration that he is liable not for the contract price but for some smaller sum? In my opinion an action in such a case will not lie. Such a declaration at the instance of such a plaintiff is impossible.

An action is a legal proceeding in which a plaintiff claims against a defendant or against a fund enforcement of some obligation towards the plaintiff binding the defendant or the fund. The plaintiff must allege facts which if true give rise as matter of law to such an obligation. Such alleged facts constitute a cause of action. In the absence of such alleged facts, in other words, if there is no cause of action alleged, an action

(1) (1879) 13 Ch. D. 696, at p. 712.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Buckley L.J.

will not lie. Before the Judicature Acts it was familiar that a plaintiff in the Court of Chancery often alleged in his bill imaginary facts with a view to interrogating upon them and seeing whether he had a case or not; knowing full well that if he did not allege facts which raised a cause of action his proceeding would come to an abrupt end on demurrer.

An injunction is a remedy which the Court applies under proper circumstances to enforce an obligation. A declaration includes a pronouncement of the Court upon the construction of a document on which an alleged obligation towards the plaintiff depends or delimiting the obligation as existing in point of law. A declaration and an injunction are but the means of obtaining the definition of an obligation, or the enforcement in certain circumstances of an obligation, if upon the alleged facts an obligation towards the plaintiff arises as matter of law. Neither declaration nor injunction nor relief is, in my judgment, within the jurisdiction of the Court unless it be founded upon alleged facts showing (if true) a cause of action. If such facts are alleged but are not proved, the Court may, of course, make a declaration or express an opinion disclosing the ground on which the action fails, and may thereupon dismiss it.

The concluding words of Order xxv., r. 5, are capable of being read as empowering the Court to make declarations where relief could not be claimed. The language of the Chancery Procedure Act, 1852, s. 50, was: "No suit . . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief." The words of Order xxv., r. 5, are: "whether any consequential relief is or could be claimed or not." But it is impossible, I think, to read the words of the rule as giving the Court power to make a declaration where there is no cause of action. If that were its effect, this part of the rule would be ultra vires. If there is no cause of action there is, in my opinion, no jurisdiction. A rule cannot create jurisdiction. The rule is only one of procedure: per Lord Davey in *Barraclough* v. *Brown*. (1) Further, the rule has followed after Order xxv., r. 4, which had provided

(1) [1897] A. C. at p. 624.

the means for getting rid of the proceeding in any case in which there was no reasonable cause of action. The action mentioned in r. 5 must, I think, be an action in which there is a cause of action, and which could not be got rid of under r. 4. The last words, though difficult, bear a meaning if they are understood to include cases in which consequential relief could not presently be given, as, for instance, where the declaration sought is as to future or reversionary rights, and are also intelligible if addressed to such a case as that which arose in *London Association of Shipowners* v. *London and India Docks Committee* (1), where the Peninsular and Oriental Company alleged that they would as customers of the defendants be entitled under circumstances to certain accommodation in the docks, and the defendants denied that right, and a declaration was obtained to quiet the matter, although an injunction was refused because the plaintiffs had never sought to avail themselves of the right and been denied. Lord Davey so understood the rule, and in *Barraclough* v. *Brown* (2) used the following words: "It would obviously be incompetent for the judges or the Rule Committee under a power to make rules of procedure to give the Court power to deal with a matter which is outside its jurisdiction. The rule relates to procedure only, and must be so construed." The jurisdiction was in that case by statute in another tribunal, but the principle of the words is generally applicable. Such a case as *London Association of Shipowners* v. *London and India Docks Committee* (1) is analogous to a case in which a plaintiff sues for an injunction on the ground that the defendant threatens and intends to do something which the plaintiff says is contrary to some obligation binding on the defendant. The act may not yet have been done. There may be no right to relief by way of damages, but there may be a right to relief prospective in its nature, that is to say, to an injunction forbidding the defendant so to act as to involve the plaintiff in damage.

Further, the declaration authorized by Order xxv., r. 5, is a "declaration of right"—that is, of the plaintiff's right—"whether any consequential relief is or could be claimed or not." It does

(1) [1892] 3 Ch. 242. (2) [1897] A. C. at p. 624.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Buckley L.J.

not authorize a declaration of obligation. Where the cause of action is in the defendant and not in the plaintiff the declaration which the plaintiff seeks is a declaration, not of any right of his, but a declaration that his obligation is not that which the defendant alleges.

In the case before the Court Hannay & Co. allege facts which show an obligation towards them binding the Guaranty Trust Company, and they are suing upon it in New York. Hannay & Co. have a cause of action and are seeking to enforce it in an appropriate jurisdiction. The Guaranty Trust Company, on the other hand, have no cause of action against Hannay & Co. They have brought an action in this country asking for a declaration as to the English law which is material in the American proceedings, and asking for an injunction to restrain the further prosecution of proceedings in America. With the question whether upon proper allegations of fact there would be a cause of action for an injunction I need not concern myself, for the appellants do not ask upon the present application to strike out that part of the indorsement on the writ which asks for an injunction. The Guaranty Trust Company say, and it is the fact, that Hannay & Co. could have sued them in this country, and that the English law could better be applied here than ascertained by evidence for application in America. In this I agree. In the course of the case I suggested that Hannay & Co. should sue here upon proper terms, such as that the evidence already taken in America should be available here, and that all costs in America, including the costs of this appeal, should be costs in the English action. Hannay & Co. declined this, and they are not compellable to adopt the suggestion. We have to deal with the action before ns. In my opinion no cause of action is disclosed. The declarations which the Guaranty Trust Company ask for, if made, would be merely an expression of opinion by this Court to which this Court could give no effect whatever. There is no claim by the Guaranty Trust Company against Hannay & Co. with a view to whose determination this Court could declare, for there is no existent liability of Hannay & Co. towards the Guaranty Trust Company. As regards the declarations, the action will not, in my opinion, lie.

In asking for them the Guaranty Company are, in fact, seeking to compel Hannay & Co. to litigate the cause of action which Hannay & Co. have against them in a forum to which Hannay & Co. are not bound and are not minded to resort.

Numerous authorities have been referred to. Some of them may be dismissed shortly. In *The Manar* (1) there was plainly a cause of action. The plaintiffs were mortgagees of a ship, the defendants were necessaries men. As between those parties arose a contest as to their rights against the ship. They were parties both interested in a property against which the plaintiffs claimed to enforce a right which they alleged. In *Williams* v. *North's Navigation Collieries* (2) the plaintiffs were workmen claiming to recover sums which they alleged to have been improperly deducted from their wages and claiming a declaration that the deduction was illegal under the Truck Act, 1831. In *Chapman* v. *Michaelson* (3) the plaintiff was a trustee under a scheme of arrangement, and the defendant an unregistered money-lender who had taken a mortgage from the debtor. The plaintiff said that that security was bad by reason of the statute, and that the fund coming to him was so much the larger in consequence. In *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (4) the plaintiffs failed in obtaining a declaration of invalidity of letters patent because no legal right of the plaintiffs had been infringed. In *Offin* v. *Rochford Rural Council* (5) the plaintiff failed in obtaining a declaration because, as the learned judge held, he had no cause of action. Whether he rightly so held or not I do not stay to inquire. If he had no cause of action, then the learned judge's words at p. 358 in my opinion are right. He said: "I think that in order to justify an action there must still, as before that rule, be some cause of action; and all that the rule means is, that if there is a cause of action the plaintiff may ask, and the Court may award, merely a declaration asserting his right without awarding damages or an injunction or any other form of specific relief. But in order to

(1) [1903] P. 95.

(2) [1904] 2 K. B. 44; [1906] A. C. 136.

(3) [1908] 2 Ch. 612; [1909] 1 Ch. 238.

(4) [1906] 1 Ch. 324; [1906] 2 Ch. 498.

(5) [1906] 1 Ch. 342.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Buckley L.J.

justify an action there must be still, as before the rule, a cause of action." I prefer this statement of the law to another by the same learned judge to the contrary effect in *Burghes* v. *Attorney-General.* (1) The learned judge there failed to observe that *Jenkins* v. *Price* (2), to which he refers as an example, was a case upon the construction of a document. Of this class of case I will say something presently. In *Williams* v. *North's Navigation Collieries* (3) Collins M.R. said: "We felt that there would be a difficulty in making the declaration which the plaintiffs asked for, even if we should be of opinion that such a set-off was a violation of the statute, because, even on the view of the plaintiffs who asked for it, the declaration would not be ancillary to the putting in suit of any legal right." The reversal of the decision in the House of Lords (4) does not affect the sentence which I have quoted.

The respondents principally relied upon the decision of the Court of Appeal in *London Association of Shipowners* v. *London and India Docks Committee.* (5) It is, I think, no decision in their favour, but on the contrary is against them. The declaration there made was a declaration that certain regulations of the defendants were not binding upon the plaintiffs. The plaintiffs were the Peninsular and Oriental Company and another company who had no interest and were upon that ground ignored. The Peninsular and Oriental Company had never so required berths in the dock as that the regulations were a deprivation of their rights, and upon that ground the decision of the Court below, which had refused them an injunction, was affirmed. Lindley L.J.'s judgment dealing with this point concludes at p. 259 with the words: "The order appealed from must therefore stand." His reasoning down to that point is addressed to leading to that conclusion. But then he goes on to express the reasons for which he considers that a declaration ought to be made, and he does so expressly upon the footing that there were rights of the Peninsular and Oriental Company which could be ascertained and declared. Those rights arose in

(1) [1911] 2 Ch. 139, at p. 155.
(2) [1907] 2 Ch. 229.
(3) [1904] 2 K. B. 44, at p. 49.
(4) [1906] A. C. 136.
(5) [1892] 3 Ch. 242.

the following manner. The Peninsular and Oriental Company never had in fact asked for unappropriated berths, but as customers of the docks they might do so. As the Lord Justice expresses it, they had rights in that respect, and it was in elucidation of those rights that the Court went on to declare as to the regulations being binding or not binding upon the plaintiffs. Kay L.J. at p. 273 says the same thing in still plainer terms. He says: "They may at any time require to use the docks for ships for which no berth is appropriated. I think that, without adding any other plaintiff, as the suit is now constituted, it is right that the Court should declare to what extent these regulations are proper and can have any effect in law so far as the Peninsular and Oriental Company are concerned." That decision therefore, in my opinion, is expressly to the effect that only if the plaintiff has rights in the matter in respect of which the declaration is sought can a declaration be made. There is another decision in the Court of Appeal, *Dyson* v. *Attorney-General* (1), which requires careful consideration. It is a case in which the plaintiff sued for a declaration that he was under no obligation to fill up Form IV. under the Finance (1909-10) Act, 1910. In other words, the plaintiff was alleging that he was not under an obligation and asking for a declaration to that effect. But the action contained an allegation that the Commissioners threatened to enforce penalties against him for failure to make the return. The plaintiff did not go on, I agree, to ask for an injunction based upon that threat, and it would have been a serious question whether an injunction could be obtained against the Crown. All that the Court decided was that they would not strike out the pleading under Order xxv., r. 4, as disclosing no reasonable cause of action, and that on an interlocutory proceeding they would not determine the question whether the action ought to be dismissed, although, as the Master of the Rolls said, that might be the result at the trial. The judgment of the Master of the Rolls contains this significant sentence at p. 417: "I desire to guard myself against the supposition that I hold that a person who expects to be made defendant, and who prefers to be a plaintiff, can, as a matter of right, attain his object by

(1) [1911] 1 K. B. 410.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Buckley L.J.

commencing an action to obtain a declaration that his opponent has no good cause of action against him. The Court may well say, 'Wait until you are attacked and then raise your defence,' and may dismiss the action with costs. This may be the result in the present case. That, however, is not a matter to be dealt with on an interlocutory application. It is pre-eminently a matter for the trial." The action subsequently came on for trial and is reported in [1912] 1 Ch. 158. The Court adhered to the views expressed on the interlocutory application and made certain declarations. I note, however, three things: first, that both the Crown, see p. 161, and the plaintiff, p. 162, were asking for declarations; secondly, that the matter for decision was the construction of an Act of Parliament; and thirdly, that the plaintiff was threatened with penalties if he did not do certain acts which according to the defendant's construction of the Act he was bound to do. The question, therefore, was as to the construction of a document which bound the plaintiff, and upon which the defendant was threatening him with penalties if he did not act upon the footing that the construction was that which the defendant alleged. In both *Dyson* v. *Attorney-General* (1) and *Burghes* v. *Attorney-General* (2) the judges rely upon the threat of penalties as a material element: see Cozens-Hardy M.R. at p. 166, Fletcher Moulton L.J. at p. 168, Farwell L.J. at pp. 172, 189. If ever there was a case in which the Court would seek to find that it had jurisdiction this was one; and there was, I conceive, a cause of action in the plaintiff, namely, that of any one party to a document against the other parties to ascertain its true construction (this is the subject of Order LIV. A, r. 1), and the claim to protection against proceedings for penalties which, according to the plaintiff's construction, had not been incurred. I do not think the case is an authority for the proposition that a plaintiff who has no cause of action can obtain a declaration as to the law applicable to a case in which the defendant has a cause of action against him.

There are several cases (Bankes L.J. has referred to some of them in the judgment to be presently delivered) in which declarations have been made as to the construction of a document

(1) [1912] 1 Ch. 158. (2) [1912] 1 Ch. 173.

at the instance of some one of the parties to the document against the others. These cases, in my opinion, throw no light upon the question which arises in the present case. There is a cause of action as between parties who by personal contract or statutory obligation are bound towards each other, and it arises from their mutual obligations.

There seems to be one case, and one only, in which a plaintiff obtained a declaration as to his obligation towards the defendant. It is *Société Maritime et Commerciale* v. *Venus Steam Skipping Co.* (1) I think that decision was wrong, for it was not a question of construction of a contract, but a question whether the plaintiffs were bound by a certain contract towards persons who were not parties to it. *Lofthouse Colliery* v. *Ogden* (2), rested as it was upon Order XXV., r. 5, was also, I think, wrong. But it may be that that decision could have been supported under Order LIV. A, r. 1, but for the principle of *Barraclough* v. *Brown*. (3) It was a case in which the Court was making a declaration in a matter in which the jurisdiction to give effect to the right declared rested not in the Court but in another tribunal. It was in this respect similar to *Barraclough* v. *Brown* (3), where the House of Lords held that the High Court could not make a declaration when the jurisdiction was by statute in a Court of summary jurisdiction.

In the present case the plaintiffs are asking for a declaration as to their obligation towards the defendants. In my opinion the Court has no jurisdiction to make it. I think the appeal should be allowed, and the three declarations struck out from the indorsement on the writ.

PICKFORD L.J. read the following judgment:—In this case the plaintiffs sue the defendants for a declaration that the plaintiffs are not liable to the defendants in respect of money paid on certain bills of exchange, and for an injunction to restrain the defendants from suing the plaintiffs in any foreign Court to recover such money. The ground of the alleged liability is not important. The defendants have sued the plaintiffs in the United States of America in respect of the money paid on one of the

(1) 9 Com. Cas. 289. (2) [1913] 3 K. B. 120.
(3) [1897] A. C. 615.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Pickford L.J.

bills, and obtained judgment in the Court of first instance. That judgment has, however, been set aside and a new trial ordered, and the matter is now pending in the Courts of the United States of America, and the injunction sought is to restrain the defendants from proceeding with that action or instituting any proceedings in respect of the other bills.

The matter comes before us in a peculiar and, I think, most unsatisfactory way owing no doubt to the laudable wish of both sides to have a decision or at any rate an opinion of the Court as soon as possible. The plaintiffs after the issue of the writ made an application for an interim injunction as claimed in clauses 4 and 5 of the writ. On the hearing of this application counsel for the defendants said that he intended to raise the question that the Court had no jurisdiction to make the declarations claimed in clauses 1 to 3 of the writ on the ground, as stated by Bailhache J., before whom the case came, that such declarations could only be made (1.) as ancillary to putting some rights in the person asking the declaration in suit or (2.) at the instance of a party who desires to use the declaration to support some right which he seeks to enforce.

It seems to me clear that even if this contention were right it would not necessarily dispose of the claim for an injunction, for a person can be restrained from instituting or continuing proceedings in a foreign Court if a proper case of injustice or oppression be made out without any declaration of right.

However, I suppose that the parties were of opinion that this objection raised the substantial question between them and it was agreed that the case should be argued as though the defendants had taken out a summons under Order xxv., r. 4, to strike out the claim as disclosing no cause of action. The proceedings were therefore transformed from an application by the plaintiffs for an injunction under clauses 4 and 5 of the writ to an application by the defendants to strike out the claim, and in reality this was confined to striking out clauses 1 to 3, as it was admitted in argument before us that clauses 4 and 5 could not be struck out at this stage. I doubt if that proceeding was regular, as the indorsement on the writ is not a statement of claim, and therefore not a pleading, and none has been delivered.

However, it was heard by Bailhache J. on that basis, and after full argument he dismissed the application under Order xxv., r. 4, with costs.

Against that decision this appeal was brought, and, strictly speaking, the only question before us is whether the claim, so far as it asks for a declaration, should be struck out under Order xxv., r. 4. I think the answer as to that is plain and clear; i.e., that it should not, for that summary procedure is only to be applied in plain cases, and this is not one. This was the decision on a similar point in *Dyson* v. *Attorney-General.* (1)

But the case was not argued before us on that ground only, but on the larger ground of whether the objections made by the defendants to the power of the Court to make declarations were sound, and the parties desired the opinion of the Court on that larger question whether such a declaration can be made. It may be doubted whether such an opinion will be of any value, because a Court before which this case came might well say that it was not necessary for the decision of the exact point before us and therefore may be disregarded.

The question really turns upon two matters: (1.) Does Order xxv., r. 5, mean that the Court has power to make such a declaration as is here asked; and (2.) If it has that meaning, is it ultra vires as purporting to enlarge the jurisdiction of the Court which cannot be done by a rule made by the Rule Committee? If such a meaning can be given to the rule I think it should be given. To narrow it as asked by the defendants would be to put an end to what has been a most valuable procedure, especially in commercial matters. I may instance one case, *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (2), in which questions involving most important matters on which immediate action was required were decided, which, apart from this rule, could only have been decided after great delay, inconvenience, and expense. Still if the power be not validly conferred it cannot be exercised.

The history of the matter is shortly that before 1852 the Court of Chancery would not give declaratory judgments unless at the same time it gave consequential relief. In that year an

(1) [1911] 1 K. B. 410. (2) 9 Com. Cas. 289.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Pickford L.J.

Act (15 & 16 Vict. c. 86) was passed which provided in s. 50 that "No suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief." This was interpreted to mean that such a judgment could not be given unless consequential relief could also be given although in fact it was not. This may have been too narrow a construction, as suggested by James L.J. in *Cox* v. *Barker* (1), but it prevailed until 1883, when the present rule was passed providing that "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." The first objection is that the rule only gives the right to a declaration as ancillary to putting some right in suit, or, as it is also expressed, a person can only ask for a declaration when he has a cause of action. This, of course, must mean a cause of action apart from the provisions of the rule. I think that, if this be the meaning, the rule has no effect whatever, for a declaration under these circumstances could be made before. I find that Farwell L.J. said in *Chapman* v. *Michaelson* (2), quoting from Lindley M.R. in *Ellis* v. *Duke of Bedford* (3): "'Moreover now, under the Judicature Act, actions can be brought merely to declare rights, and this is an innovation of a very important kind,' and then he refers to Order xxv., r. 5. It seems to me also a very important innovation." If the defendants are right on this first point it is no innovation at all.

But I think the contention cannot be maintained either on principle or authority. If there be a cause of action apart from the rule there must be also a consequential right to relief. The mere fact of being entitled to a right does not give a cause of action, which only arises when there is interference, actual or threatened, with the right, and in that case there is a right to relief, in the first case by damages or injunction or both, or possibly by specific performance, and in the latter by injunction.

(1) 3 Ch. D. 359, at p. 370. (2) [1909] 1 Ch. 238, at p. 243.
(3) [1899] 1 Ch. 494, at p. 514.

In such cases, therefore, consequential relief could be given whether it was or was not given, and the rule says the declaration may be made where consequential relief could not be given.

It seems to me, therefore, that it cannot be confined to cases where there is a cause of action apart from the rule. It has been suggested that "could not" may be read "could not presently" or "at present," but I do not think that such an interpretation is of any assistance, for if there is a cause of action there is a present right to relief, and if there is not a present right to relief there is not a cause of action. But in my opinion this point is covered by authority in this Court in the case of *London Association of Shipowners* v. *London and India Docks Committee.* (1) That was an action to declare certain regulations made by the defendants invalid and for an injunction to restrain them from enforcing them. It is not necessary to notice the case of the first plaintiffs as they were held not entitled to maintain the action on grounds which do not touch this case. The Peninsular and Oriental Steam Navigation Company were customers of the docks, and there were both appropriated and unappropriated berths. The Peninsular and Oriental Steam Navigation Company from the nature of their business only used appropriated berths, but like any other shipowner it was possible that they might some day want an unappropriated berth, and they in the first instance asked for an injunction in respect of both kinds of berths. In the course of the argument in the Court of Appeal the claim for an injunction was dropped. A. L. Smith J. dismissed the action with costs, which he could not have done if any cause of action had been made out, and the plaintiffs appealed. The Court of Appeal affirmed the decision dismissing the action, but made a declaration at the instance of the Peninsular and Oriental Company that the regulations as to unappropriated berths were invalid. I have examined the actual order made in the case, and find that, after making two declarations, (1.) that the regulations are not binding on the Peninsular and Oriental Steam Navigation Company, and (2.) that the Peninsular and Oriental Steam Navigation Company are not entitled to have appropriated berths except on terms agreed

(1) [1892] 3 Ch. 242.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Pickford L.J.

between them and the defendants, it proceeds that the said appeal be dismissed without costs to either side. This may or may not be a correct order to have made; it may be that it would have been more correct to have dismissed the action except so far as regards the making of the declaration; but it seems to me to show that the Court intended to affirm the decision that no cause of action in the ordinary sense was made out, and still it made the declaration. On looking at the judgments delivered I think it is made clear that such was the intention of the Court. The case as to appropriated berths does not touch the point, and the only possible cause of action in respect of the unappropriated berths was a right to an injunction for a threatened interference by imposing improper conditions by the regulations. Lindley L.J. examines that contention and comes to the conclusion that they had no such right, because there was no reasonable prospect of their wanting such a berth and no certainty that if they did the dock company would insist on the regulations, and concludes: "The Peninsular and Oriental Company has, in fact, failed to establish its alleged rights and the order (i.e., dismissing the action) must stand." That seems to me a clear decision that there was no cause of action, apart from that given by the rule, but the learned Lord Justice went on to say that he thought the Peninsular and Oriental Steam Navigation Company were entitled to a declaration that the regulations were invalid and could not be imposed on them if they should happen to want an unappropriated berth. Bowen L.J. discusses the suggested right at considerable length and comes to the same conclusion that no such injunction could be granted; and Kay L.J., after discussing the position of the parties, states the question before him in this way (at p. 273): "But it is suggested that to make such a decree in this case, if the plaintiffs have no cause of action, would be an excess of jurisdiction; and it has been doubted whether this Order gives the Court any new jurisdiction. I refer to the case of *Brooking* v. *Maudslay, Son & Field* (1)"; and later on: "The strongest mode of stating the objection is that the present plaintiffs, even if the defendants are committing a wrongful act, are not

(1) 38 Ch. D. 636.

damaged by it, and therefore have no cause of action against the defendants; and that Order xxv., r. 5, to which I have referred, does not enable the Court to make a declaratory decree in such a case, or if it does it would be ultra vires." He then points out that the Peninsular and Oriental Steam Navigation Company are proper plaintiffs because they have the right to ask for an unappropriated berth although they have never done so, and concurs both in dismissing the action and in making the declaration. This seems to me a clear decision that there may be a right to a declaration, although the person asking for it has no cause of action apart from the rule, and I think the cases of *Dyson* v. *Attorney-General* (1) and *Burghes* v. *Attorney-General* (2) are to the same effect. I do not think it could be contended that the plaintiffs in those cases had any cause of action; the only possible cause would be an injunction because of a threatening and intending to enforce the provisions of the forms, and I do not see how such a cause of action could exist against the Attorney-General as representing the Crown.

The chief authorities relied on in argument for the opposite contention were a dictum of Collins M.R. in *Williams* v. *North's Navigation Collieries* (3), and a decision of Warrington J. in *Offin* v. *Rochford Rural Council* (4) and of Joyce J. and the Court of Appeal in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (5) In the last case this question was not decided. All that Joyce J. and the Court of Appeal decided was that the order should not in that case be made. In the case before Warrington J. he certainly held that there could be no declaration without a cause of action, but the cases on the point do not seem from the report to have been cited to him, and in the case of *Burghes* v. *Attorney-General* (6), after they had been cited, the same learned judge said (at p. 155): "It is contended that there is no cause of action against the Crown or its officers, that they have broken no contract and have done the plaintiff no legal wrong, nor do they threaten to do so. But Order xxv., r. 5, is

(1) [1912] 1 Ch. 158.
(2) [1912] 1 Ch. 173.
(3) [1904] 2 K. B. 44, at p. 49.
(4) [1906] 1 Ch. 342.
(5) [1906] 1 Ch. 324; [1906] 2 Ch. 498.
(6) [1911] 2 Ch. 139.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Pickford L.J.

intended to deal with the very case—that is, one in which no relief can be claimed either by way of damages for the past or an injunction for the future, and, in fact, in several cases declarations have been made under this Order where there was no cause of action in the proper sense." By "the proper sense" the learned judge no doubt means apart from the provisions of the rule, and he refers to *Jenkins* v. *Price* (1) before Swinfen Eady J., where a declaration was made in a case in which it was admitted there was no cause of action.

The dictum of Collins M.R. is, in my opinion, opposed to the later decisions and cannot be supported.

The next contention is that, even if there is no necessity for a cause of action, the declaration can only be made at the instance of the person claiming the right and intending to assert it if it should become necessary. I can find no such limitation in the words of the rule, and I can see no reason why it should be imposed if it is once established that a declaration can be made where no consequential relief can be given. No such limitation, so far as I know, has been suggested in the analogous procedure under Order LIV.A of declaring rights arising out of documents. But I think this point again is covered by authority in the cases of *Dyson* v. *Attorney-General* (2) and *Burghes* v. *Attorney-General.* (3) The plaintiffs in those cases were not claiming to exercise any right; they claimed a declaration that a document which might be used to make a demand upon them was invalid and got it.

I think therefore that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration. It does not extend to enable any stranger to the transaction to go and ask the Court to express its opinion in order to help him in other transactions. Whether it extends to a declaration that the plaintiff is not liable in an action intended or proceeding is a matter I shall discuss in dealing with this particular case.

The next question is whether if this be the meaning of the

(1) [1907] 2 Ch. 229. (2) [1912] 1 Ch. 158.
(3) [1912] 1 Ch. 173.

rule it is ultra vires. It is said to be so because it adds to the jurisdiction of the Court, which cannot be done by rules of practice and procedure. The word "jurisdiction" and the expression "the Court has no jurisdiction" are used in two different senses which I think often leads to confusion. The first and, in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that although the Court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances.

The distinction is, I think, well shown by the two cases of *Barraclough* v. *Brown* (1) and *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith*. (2) In the first case there was a true want of jurisdiction. The power to decide the dispute as to the particular subject-matter had been taken away by the statute from the High Court as a Court of first instance and given to another tribunal. In the second the Court could decide the dispute and give the relief, but by a settled practice embodied in a rule it would not do so except under certain circumstances, i.e., if the subject-matter was of the value of 10*l.* or over. Yet Lord Esher M.R. in *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (2) used the expression "jurisdiction," although clearly what was laid down by a rule could be altered by a rule, and the expression is used in this sense in many cases. It is, I think, necessary to keep this distinction in mind in considering whether this rule is ultra vires. If it adds to the jurisdiction in the first sense of giving power to deal with matters which could not in any case or under any circumstances be entertained it is ultra vires, and it is to this state of things that the remarks of Lord Davey in *Barraclough* v. *Brown* (3) were addressed. But if its only effect is to provide that the Court may deal with a matter with which it can already deal in a different manner under different circumstances and when

(1) [1897] A. C. 615. (2) 30 Ch. D. 387
(3) [1897] A. C. at p. 624.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Pickford L.J.

brought before it by a different person, it is, in my opinion, only dealing with practice and procedure and is intra vires. The latter, in my opinion, is the position in this case. Admittedly if a declaration as to liability on these bills of exchange were asked for by some one who wanted it for the purpose of getting consequential relief it could be made, and all that the rule does is to remove the restriction imposed upon the making of it by the practice of the Court. It is worthy of notice, though not conclusive, that the Act 15 & 16 Vict. c. 86, which by s. 50 gave the right to make a declaration when no consequential relief was given, is called "An Act to amend the Practice and Course of Proceeding in the High Court of Chancery."

There only remain to be considered the circumstances of this particular case. It has been ascertained in the course of the case that the rights of the parties depend upon a question of English law, and, in my opinion, the whole object of this action is either directly by means of an injunction or indirectly by means of a claim for a declaration to compel the defendants to litigate that question in England and not in the United States of America. If that cannot be done it will very probably be the case that if this declaration were made it would be used to guide the Court in the United States of America to the determination of the point of law, but the real intention is to make it not worth the defendants' while to go on with their action there. It may very well be that it is more convenient to decide the question here, and I regret that the suggestion of Buckley L.J. was not accepted, but the defendants are entitled to bring their action in the United States of America, and can only be prevented from doing so on the principles laid down in *Logan* v. *Bank of Scotland*. (1) This procedure is open to the plaintiffs, and if they fail to establish their right in that way I do not think they should be allowed to obtain it indirectly by this declaration. But the question is whether that goes to the power to make the declaration. I think that a declaration that a person is not liable in an existing or possible action is one that will hardly ever be made, but that in practically every case the person asking it will be left to set up his defence in the action when it

(1) [1906] 1 K. B. 141.

is brought (see per the Master of the Rolls in *Dyson* v. *Attorney-General* (1), and per Joyce J. in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (2)); but taking the large view that I do of the effect of Order xxv., r. 5, I am not prepared to say that it is beyond the power of the Court in a very exceptional case to make such a declaration, and that the fact of its being asked for a purpose which the Court does not approve does not take away the power to make it, but only gives reason to refuse it.

I think, therefore, that there is jurisdiction to make this declaration, but as I understand the circumstances now it ought not to be made. In my opinion the appeal should be dismissed on the ground that this is not a proper case for the summary procedure under Order xxv., r. 4, and on the other questions on which our opinion has been asked I think the Court has power to make the declaration, but on the facts at present before me I think it ought not to be made. I think the action should be allowed to proceed to trial when all the facts can be ascertained and a proper decision arrived at, which cannot, in my opinion, be done in the present proceeding. I understand that the question of whether as a matter of discretion the order should be made was not argued in the Court below. I think therefore that the appeal should be dismissed, the order of the learned judge making the costs of the application costs in the cause should stand, and the costs of this appeal should also be costs in the action.

BANKES L.J. read the following judgment:—This is an appeal from a decision of Bailhache J. raising important questions as to the construction and effect of Order xxv., r. 5, of the Rules of the Supreme Court.

The appellants are cotton dealers carrying on business in Manchester. In the years 1909 and 1910 they made purchases of cotton from a firm in Alabama, U.S.A. The course of business with regard to such transactions was for the sellers upon shipment of the cotton to draw a bill of exchange for the price of the cotton and to affix thereto the bills of lading and insurance certificate, and to transmit the documents to the purchaser in

(1) [1911] 1 K. B. at p. 417. (2) [1906] 1 Ch. 324, at pp. 329, 330.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Bankes L.J.

order that he might accept the bill of exchange and pay the amount thereof. Amongst other bills of exchange so drawn was one for 1464*l.* 9*s.* dated February 10, 1910. This bill was purchased by the respondents, a company carrying on business in New York and having a branch in London, and was presented by them with the accompanying documents to the appellants or their agents, who caused the same to be accepted and paid. It subsequently appeared that the bill of lading was a forgery, one only of a number of similar forgeries, by means of which very large sums of money had been obtained upon bills of lading for cotton which never had any existence and which had never been shipped. In January, 1911, the appellants commenced an action against the respondents in the United States District Court, claiming repayment of the amount of the above mentioned bill of exchange; their claim was based on grounds depending mainly, if not entirely, upon English law. The action was tried, and the appellants recovered judgment. There was an appeal; and a new trial was ordered. At this stage the respondents on October 12, 1914, issued a writ in the King's Bench Division, claiming a declaration (1.) that they were not liable to repay to the appellants any sums paid by them in respect of a number of bills of exchange, including the bill of exchange referred to above; (2.) a declaration that they did not by presenting the said bills of exchange for acceptance with bills of lading attached or by indorsing the said bills warrant or represent that the said bills of lading were genuine, or that the cotton therein described and referred to in the said bills of exchange had been shipped; (3.) a declaration that all the said bills of exchange were unconditionally accepted by the appellants; and claiming also an injunction restraining the appellants from further proceeding with their action in the United States Court. Application was made by the respondents by summons to Bailhache J. asking for an interlocutory injunction in the terms of the writ. Upon the hearing of the summons the learned judge intimated that he was not prepared to grant an interlocutory injunction, and thereupon, as Mr. Greer contended that the respondents' action in so far as it claimed a declaration was not maintainable, the parties decided, with the judge's approval, to take his decision upon that point as

though a summons was before him under Order xxv., r. 4. In the view I take of the case this was an unfortunate step to have taken, because it leaves undecided the very question upon which, in my opinion, jurisdiction depends. After hearing the argument, the learned judge decided in the respondents' favour on the question of his jurisdiction. We were told that the question of whether the learned judge should exercise his discretion in favour of the respondents, assuming he had jurisdiction, was not argued before him. It was not argued before us. It appears to me, however, on reading the learned judge's judgment that he did decide that point in favour of the respondents. If this view of what the learned judge decided is not correct, it is not necessary to say anything on the point of discretion, but if, on the other hand, it is correct, then I desire to say that on the materials contained in the affidavits before us I am not at all prepared to say that I agree with the learned judge's view.

As presented to this Court the argument for the appellants raised two questions: first, whether upon the true construction of Order xxv., r. 5, the respondents' claim for a declaration came within the rule; second, whether if it did the rule was not ultra vires. For the consideration of both points it is, I think, necessary to go back and trace the development of the practice with regard to declaratory judgments, and to consider also the meaning of the term "jurisdiction" when applied to the powers of a Court of justice. The term appears to be used in a double sense, sometimes as referring to a case where the matter in dispute is such that it is impossible for any Court, or sometimes for a particular Court, to entertain it; as for instance where a Court is asked to enforce an agreement which is made void by statute, or, as in *Barraclough* v. *Brown* (1), where exclusive jurisdiction had been given by statute to a Court other than that in which the application was made; and sometimes as referring to a case where the particular Court refused to entertain some matter in dispute on the ground that it was not matter proper or convenient for it to adjudicate upon. I think this distinction is well brought out in the opinion of Lord Herschell in *British South Africa Co.* v. *Companhia de Moçambique*. (2) It was in this latter sense

(1) [1897] A. C. 615.

(2) [1893] A. C. 602.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Bankes L.J.

I think that the Vice-Chancellor was speaking in the case of *Rooke* v. *Lord Kensington* (1), when he says that there was no jurisdiction in the Court of Chancery before the Chancery Procedure Act, 1852, to make a simple declaration of right where no consequential relief was claimed. I cannot doubt that had the Court of Chancery of those days thought it expedient to make mere declaratory judgments they would have claimed and exercised the right to do so. It was amongst other things to amend the practice and procedure of the Court of Chancery in this respect that s. 50 of the Act of 1852 was passed. The preamble of the statute makes this point clear. The section itself is in these terms: "No suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief." The effect of this section was that it extended the powers theretofore exercised by the Court of Chancery in relation to declarations of right to cases where no consequential relief was claimed; and it did this as a matter of the procedure or practice of the Court. In interpreting this section the Court of Chancery held that a plaintiff could not file a bill for a mere declaration unless there was some consequential relief which the Court had the power to grant, although the plaintiff had not in fact claimed it. James L.J. in *Cox* v. *Barker* (2) indicates that in his opinion this was a somewhat narrow view to take; but this was the view held until the making in 1883 of Order xxv., r. 5, upon which the question in this case turns. That rule is in these terms: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." It is obvious from a mere reading of the language of the rule that it introduces a considerable extension into the practice previously existing. It enables the Court to make the declaration irrespective of whether consequential relief could be claimed or not. Lindley M.R. in *Ellis* v. *Duke of Bedford* (3) refers to this as an

(1) 2 K. & J. 753, at pp. 760, 761. (2) 3 Ch. D. at p. 370.
(3) [1899] 1 Ch. at p. 515.

innovation of an important kind; Farwell L.J. in *Chapman* v. *Michaelson* (1) refers to it as a novel practice created by the Judicature Act, which cannot be limited by the old equitable practice; and Warrington J. in *Burghes* v. *Attorney-General* (2), differing in this apparently from what he had previously said in *Offin* v. *Rochford Rural Council* (3), says that the Order is intended to deal with the very case—that is, one in which no relief can be claimed either by way of damages for the past or an injunction for the future—and that several cases had occurred where declarations had been made under the Order where there was no cause of action in the proper sense, and he cites *Jenkins* v. *Price* (4) as an example. A later and still more forcible instance of the same view is to be found in *Dyson* v. *Attorney-General* (5), the question being as to the validity of a Form IV. notice. Fletcher Moulton L.J. says (at p. 168) "that an action thus framed" (that is, asking for a declaration of right) "is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions." In *Jenkins* v. *Price* (4) Swinfen Eady J. granted the declaration of right asked for, but without costs because the plaintiff had no cause of action, and Eve J. followed the same course in *Evans* v. *Levy*. (6)

In spite of these authorities Mr. Greer contends that the rule is ultra vires to the extent to which it purports to add to the jurisdiction conferred upon the Court of Chancery by the Chancery Procedure Act, 1852. He rests his argument upon ss. 16 and 23 of the Judicature Act, 1873, and s. 17 of the Judicature Act, 1875. By virtue of these sections of the Act of 1873 the jurisdiction which at the commencement of that Act was vested in or capable of being exercised by (among other Courts) the High Court of Chancery was transferred to the High Court to be exercised by that Court (so far as regards procedure and practice) in the manner provided by the Act or by such rules and orders of Court as might be made under the Act, and

(1) [1909] 1 Ch. at p. 243.
(2) [1911] 2 Ch. at p. 155.
(3) [1906] 1 Ch. at p. 358.
(4) [1907] 2 Ch. 229.
(5) [1912] 1 Ch. 158.
(6) [1910] 1 Ch. 452.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Bankes L.J.

where no special provision was contained therein it should be exercised as nearly as might be in the manner as the same might have been exercised by the Court of Chancery. By s. 17 of the Act of 1875 power is given to the Crown by Order in Council to make further rules for carrying the Acts of 1873 and 1875 into effect, and in particular to make rules for regulating the practice and procedure in the High Court and any matters relating to such practice and procedure. At the time of the passing of the Judicature Act, 1873, there were two statutes defining the jurisdiction of the Court of Chancery which it is material to consider, namely, the Chancery Procedure Act, 1852, and the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42). I have already referred to the material section of the first of these Acts. The later Act directed the Court of Chancery to determine every question of law and fact incident to the relief sought, even though such questions were cognizable in a Court of common law. As a result of this last statute the Courts of Chancery apparently felt themselves bound in some cases to make a declaratory order, even though the case was one in which they refused to make a declaration of right. (See *Jenner* v. *Jenner*. (1)) This was the state of things in 1883, in which year s. 50 among other sections of the Act of 1852 and the whole of the Act of 1862 were repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), and the way was clear for the Rule Committee to lay down what the practice and procedure of the Court should be. They made Order xxv., r. 5. The Order extends the previous practice, just as the statute of 1852 had done; but in my opinion the extension in each case was an extension of the practice and procedure of the Court; and subject to the limitation to which I refer later, the extension contained in Order xxv., r. 5, was, in my opinion, one which the Rule Committee were competent to make. I am therefore of opinion that both on principle and on authority Mr. Greer's contention that the rule is ultra vires fails.

The question as to the construction of the language of the rule is a difficult one. The rule is framed in two branches. It first

(1) (1866) L. R. 1 Eq. 361, at p. 368.

provides that no action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby. It then goes on to say that the Court may make binding declarations of right whether consequential relief is or could be claimed or not. The first question to decide is whether the rule is dealing with declaratory judgments and orders as one thing, and declarations of right as another and distinct thing, or whether the declaratory judgments and orders referred to are judgments and orders in the form of declarations of right. I think the framers of the rule must have had the previously existing practice in mind, and have provided both for the case of declaratory judgments and orders which are declarations of right and those which are not. If the other interpretation is put upon the rule I should be prepared to hold that what the respondents are asking for in their action is not a declaration of right at all. It is quite true that the extension made by the rule has entirely altered the character of the right which it is permissible for a plaintiff to ask to have a declaration upon; but in my opinion the expression "declaration of right" in the rule must be read in the sense which it had always previously borne, that is to say, a declaration of some right which the plaintiff maintains that he has as against the person or persons whom he has made parties to his suit. Here the respondents are claiming nothing of the kind. What they are asking is that the Court shall define their obligations to the defendants. I do not think that the alteration in the character of the right which a plaintiff is entitled to assert under the rule can have the effect contended for of altering the expression "declaration of right" either into a declaration of the rights of the parties or into a declaration as to the obligations of either party. These considerations are not, however, in my opinion sufficient to dispose of this appeal, because I think that the rule contemplates the making of declaratory judgments and orders which may not be declarations of right.

In my opinion the clue to the real meaning of the rule is to be found in the opening words. It deals with actions and proceedings. For the present purpose it is only necessary to consider an action. An action is a civil proceeding commenced by

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Bankes L.J.

a writ (Judicature Act, 1873, s. 100) and in every action there must be a plaintiff who is a person seeking relief (Judicature Act, 1873, s. 100), or, to use the language of Order XVI., r. 1, a person in whom a right to relief is alleged to exist. It is the person, therefore, who is seeking relief, or in whom a right to relief is alleged to exist, whose application to the Court is not to be defeated because he applies merely for a declaratory judgment or order, and whose application for a declaration of his right is not to be refused merely because he cannot establish a legal cause of action. It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word relief? When once it is established, as I think it is established, that relief is not confined to relief in respect of a cause of action it seems to follow that the word itself must be given its fullest meaning. There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction. Subject to this limitation I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible.

A great number of decisions have been cited to us. If the test which I have suggested is applied to them I think it will be found that the plaintiff was in each case claiming some relief, and a relief which, though in many cases not resting on a cause of action, was nevertheless within the limitation I have indicated above. In some of the cases the plaintiff was asserting a cause of action, but in many of them he was not. The character of the relief sought varied considerably. For instance, in *Dyson* v. *Attorney-General* (1) the relief claimed was a relief from the obligation to comply with a Form IV. notice under the Finance (1909-10) Act, 1910, on the ground that the notice was ultra

(1) [1911] 1 K. B. 410; [1912] 1 Ch. 158.

vires and invalid. The same kind of relief was asked for in *Burghes* v. *Attorney-General.* (1) An analogous kind of relief was applied for in *London Association of Shipowners* v. *London and India Docks Committee.* (2) In *Lofthouse Colliery* v. *Ogden* (3) the plaintiff claimed relief upon the ground that he was receiving less wages than he was entitled to, and he asked the Court to decide the point upon which his right to the wages he claimed depended. In *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (4) the relief claimed was to be relieved from performing the obligations under a contract upon the ground that the plaintiffs were not bound by it to the defendants who were insisting upon its performance. Order LIV.A, r. 1, deals in terms with a case where anticipatory relief depending upon the construction of a document is claimed. This rule gives the applicant a right to proceed by originating summons, but this is for convenience merely. I cannot doubt that if the applicant preferred to proceed by action the Court would have jurisdiction to deal with his claim under Order XXV., r. 5. In *Chapman* v. *Michaelson* (5) Eve J. brings out very clearly in his judgment the view I take as to the operation of this rule, where in reference to the plaintiff's claim for a declaratory judgment as to certain facts he said (at p. 619) that the plaintiff took upon himself to establish certain facts which if established would entitle him to statutory relief.

The only cases which appear to me to be contrary to the view which I have expressed as to the meaning of the rule are *Williams* v. *North's Navigation Collieries* (6), where the then Master of the Rolls suggested that the declaration referred to in the rule must be ancillary to the putting in suit of a legal right; this, however, was only a dictum; *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (7), where, however, it will be seen both parties admitted that the matter was one in which the learned judge could exercise a discretion; and *Offin* v.

(1) [1911] 2 Ch. 139; [1912] 1 Ch. 173.
(2) [1892] 3 Ch. at p. 259.
(3) [1913] 3 K. B. 120.
(4) 9 Com. Cas. 289.
(5) [1908] 2 Ch. 612.
(6) [1904] 2 K. B. at p. 49.
(7) [1906] 1 Ch. 324.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

Bankes L.J.

Rochford Rural Council (1), a decision of Warrington J., who later, as I have already pointed out, took a different view as to the meaning of the rule.

I pass now to consider whether the respondents' claim comes within the rule as I have endeavoured to interpret it. Are the respondents by their present action claiming any relief, or any relief which the Court can recognize? For the purpose of deciding this question it is necessary to look at the substance as well as the form of the claim. The view I take of the respondents' case is that what they really want is to stay the proceedings in America, and that the claim for the declaration is merely ancillary to the claim for an injunction. The first step after the issue of the writ was the summons for an injunction, and this was supported by the affidavit of Mr. Russell, who in paragraph 13 stated that under the circumstances he submitted that the bringing and prosecution of the action in America was vexatious and embarrassing and likely to result in grave injustice to the respondents. I did not understand Mr. Duke to dispute that the respondents' real desire in bringing the action was to get the dispute between themselves and the appellants tried in England instead of in America. The desire is one which it is easy to understand; but is it one which the Court can gratify? That depends entirely, in my opinion, upon facts which are not before us, and upon which no argument was addressed to this Court, or apparently to the Court below, though it was indicated in the affidavit to which I have referred. If the respondents' claim for a declaration is to be taken by itself, and the respondents' rights under the rule are to be decided without reference to the claim for an injunction, then, in my opinion, the respondents' action is not maintainable. The claim for a declaration is not in itself a claim for relief; and no circumstances are shown from which an inference can be drawn that underlying the claim, though not apparent on the face of it, there is a claim to relief which the Court can entertain. The circumstances might have been quite different had a case been made for the respondents that the American proceedings were vexatious, and that the present action had been brought to obtain relief

(1) [1906] 1 Ch. 342.

from those proceedings, and to bring the appellants before the Court in order to compel them to litigate the dispute in this country. The Court clearly has jurisdiction to grant an injunction restraining a person from commencing or continuing proceedings abroad, if it thinks that those proceedings are vexatious: see *Bushby* v. *Munday* (1); *Hyman* v. *Helm* (2); *Wood* v. *Connolly Brothers*. (3) A strong case, however, must be made out; and, as was said by Brett M.R. in *Hyman* v. *Helm* (4), the fact that the action is brought at an inconvenient place is not the sort of vexation upon which the Court can act.

The conclusion to which I have come upon the whole matter is that, if the respondents could establish any ground for relief from any further proceedings in the American Courts, then this Court would have jurisdiction to give them that relief, not only by the granting of an injunction, but by the making of a declaratory judgment or order upon the matter in dispute between the parties; but short of making out such a case I am of opinion that the Court has no jurisdiction to entertain the plaintiffs' claim. In the absence of any such case the respondents' application to the Court is not an action seeking relief at all. It is merely a request to the Court to supply them with evidence in a convenient form for use in the American action, and to supply it against the will of the appellants and possibly at their expense. In my opinion such a proceeding is not within Order xxv., r. 5, at all. The matter comes before us in an unfortunate form. The substance of the appeal is to obtain a decision of this Court upon the view expressed by the learned judge as to the meaning of the Order, but the form of the appeal is for an order striking out the action so far as it relates to the claim for a declaration. I have already stated the grounds upon which I disagree with the view taken by the learned judge, but I cannot say at the present stage, and upon the information at present before the Court, that the Court has no jurisdiction. I therefore think that the appeal must fail. In saying this I desire to make it quite plain that, though I am not in a position to decide the point, I think it extremely unlikely that a case can be made out giving

(1) (1821) 5 Madd. 297
(2) (1883) 24 Ch. D. 531.
(3) [1911] 1 Ch. 731.
(4) 24 Ch. D. at p. 537.

C. A. 1915

GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY & COMPANY.

the Court jurisdiction to entertain this claim or justifying the exercise of the jurisdiction if the Court possesses it. I agree with the order suggested by Pickford L.J.

Appeal dismissed.

Solicitors for plaintiffs: *Crosley & Burn.*

Solicitors for defendants: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

W. F. B.

1915
March 2.

CLARE & CO. *v.* DRESDNER BANK.

[1914 C. 3241.]

Banker and Customer—Account at one Branch of a Bank—Demand of Payment at another Branch—Refusal to pay—Action by Customer against the Bank.

The plaintiffs had an account at the Berlin branch of the defendant bank, which had its head office in Germany and a branch in London. They wrote to the London branch demanding payment of the balance due on the account at the Berlin branch, and upon refusal to pay sued the bank without having made any request to the bank in Berlin to pay or to remit the balance to London:—

Held, that the plaintiffs were not entitled to demand payment from the London branch, and that there had not been any breach by the defendant bank of any obligation to the plaintiffs.

ACTION tried before Rowlatt J. without a jury.

The plaintiffs claimed the sum of 261*l.* as money had and received by the defendants to their use, being the amount standing to the credit of the plaintiffs' banking account, on August 4, 1914, at the Berlin branch of the defendant bank.

The Dresdner Bank was a foreign corporation, incorporated under the laws of Germany, having its head office in Dresden. It had a branch in Berlin and also a branch in London.

The plaintiffs had an account at the Berlin branch, and on August 4, 1914, there was a sum equivalent to 261*l.* standing to the credit of that account. On December 1 the plaintiffs wrote to the London branch asking for payment of this amount, which was refused. No demand for payment or for remittance of the

amount to London was made by the plaintiffs to the head office or the Berlin branch. On December 3 the writ in this action was issued; it was served at the office of the bank in London, and an application at chambers by the defendants to set aside the service was dismissed.

D. M. Hogg, for the plaintiffs. In a similar action against a German bank Scrutton J. gave judgment in favour of the plaintiffs: *Leader & Co.* v. *Direction der Disconto-Gesellschaft.* (1) The relation between banker and customer is that of debtor and creditor. In the absence of any special contract to the contrary, the debtor is bound to seek out his creditor and pay him, and no demand of payment is required before the creditor can sue the debtor wherever he can be found: *Atkinson* v. *Bradford, &c., Society* (2); *Foley* v. *Hill* (3); *Pott* v. *Clegg* (4); *Walton* v. *Mascall.* (5) Therefore the plaintiffs are entitled to sue the defendant bank in London where it carries on business without making any previous demand or request for payment. If any request was necessary, a sufficient request was made by the letter to the London office on December 1.

C. W. Lilley, for the defendants. The relation of banker and customer is not simply that of debtor and creditor. A customer of a bank with different branches cannot demand payment at any branch except that at which he keeps his account. He must ask that branch to pay him or to remit the money to another branch for him. Here no request was made to the defendants in Germany either to pay or to remit to London, and there has been no breach of any obligation to their customer. In the case before Scrutton J. a request had been made to the bank in Berlin to remit the money to London and the bank had refused to do so.

ROWLATT J. I think that this action fails. [The learned judge stated the facts, and proceeded:] Mr. Hogg contends that the relation of banker and customer is simply that of debtor and creditor, with a superadded obligation to honour cheques. That

(1) (1914) 31 Times L. R. 83.
(2) (1890) 25 Q. B. D. 377.
(3) (1844) 1 Ph. 399.
(4) (1847) 16 M. & W. 321.
(5) (1844) 13 M. & W. 452, at p. 458.

1915

CLARE & Co. v. DRESDNER BANK.

Rowlatt J.

of course is right. Then he says that before suing the debtor it is not necessary to make any demand of payment, and cites the cases decided upon the Statutes of Limitation. It seems to me, however, that locality is an essential part of the debt owing by a banker to his customer, and that his obligation to pay is limited to the place where the account is kept. As a rule, no doubt, a debtor has to seek out his creditor and pay him; but in the case of a bank with several branches that cannot be the true relation of the parties. Money has a different value in different parts of the world even although it may be expressed in the same currency, and I cannot conceive it possible that a man who has, we will say, 1000*l.* sterling to his credit at a bank in New Zealand on coming to London would have the legal right to demand payment of 1000*l.* at an office of the same bank in London without being liable to pay anything in consideration of that convenience or even to give time for the bank in London to ascertain whether he was in fact a customer of and had a credit balance at the branch in New Zealand. Everybody knows that in certain states of the exchange people in some parts of the world, having debts to pay in another part of the world, find their account in actually shipping bullion, paying the freight and the insurance involved in that operation; and if a man who has money to his credit at a bank at one end of the world can demand it at another end of the world without paying anything for that advantage, that would put upon his debtor the expense which might be involved in having the money at the one place instead of the other.

I come to the conclusion, therefore, that, although the question seems never to have been raised before, probably because such a thing has never been dreamt of, there is no obligation on a bank to pay in one country a debt due to a customer on current account in another country.

Under these circumstances how am I to apply that here? There was a case of *Leader & Co.* v. *Direction der Disconto-Gesellschaft* (1), tried before Scrutton J., against a German bank having a branch in London, where the plaintiffs, who had an account at the Berlin branch, succeeded. In that case, however,

(1) 31 Times L. R. 83

there had been a request to the bank abroad, where the account was kept, to remit the money to London. It is well known that a banker will send a remittance to another country, making the proper charges, at the request of his customer having an account, and when the bank, in that case, refused to send the remittance at the customer's expense from the place where the account was kept there was a refusal to perform their obligation and a cause of action accrued which might be enforced wherever the bank could be found.

Now in this case there has not been any demand upon the head office or the Berlin branch and no dishonouring by the bank in Berlin of the obligation to pay or remit. I can deal only with the facts before me, which are simply that the London office had been asked, not to fetch the money from the other side, if I may use the expression, but to honour an obligation to pay in London money deposited at their branch in Berlin. I do not think that is in accordance with law or business, and therefore I give judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Clifford, Turner & Hopton.*

Solicitors for defendants: *Herbert Smith, Goss, King & Gregory.*

J. H. W.

C. A.
1915
March 11, 12, 13.

[IN THE COURT OF APPEAL.]

HARRIS *v.* TAYLOR.

[1913 H. 2761.]

Foreign Judgment—Jurisdiction of Foreign Court—Voluntary Submission to Jurisdiction—Conditional Appearance.

The plaintiff brought an action against the defendant in the High Court of the Isle of Man claiming damages for criminal conversation with the plaintiff's wife. The defendant was at no material time domiciled or resident in the Isle of Man. The plaintiff obtained leave to serve the defendant with a writ of summons out of the jurisdiction and the defendant was duly served with a writ in England. The defendant subsequently appeared "conditionally" and applied to the Court to set aside the order for service out of the jurisdiction and the writ on the ground, inter alia, that the defendant was domiciled in England. The Court dismissed the application. The defendant took no further part in the proceedings and the plaintiff eventually recovered judgment in the action for damages and costs. The plaintiff then brought this action against the defendant to enforce the judgment:—

Held, affirming the judgment of Bray J., that the defendant by reason of his application to the Isle of Man Court had voluntarily submitted to the jurisdiction of that Court and that the judgment was, therefore, enforceable against him in England.

Appeal of the defendant from the judgment of Bray J. in an action tried without a jury at the Liverpool Assizes.

The action was brought to enforce a judgment obtained by the plaintiff against the defendant in His Majesty's High Court of Justice in the Isle of Man. The material facts were as follows. The plaintiff was a domiciled Manxman and was married to his wife in 1901 in the Isle of Man. The defendant was an Englishman. On December 17, 1912, the plaintiff commenced an action against the defendant in the Isle of Man High Court of Justice in which he claimed damages for the loss of the consortium of his wife and for criminal conversation with her both in the Isle of Man and in England. The claim for damages for loss of consortium was subsequently withdrawn. The defendant was residing in England when the action was commenced, and the plaintiff applied for and obtained an order for service out of the jurisdiction of a writ of summons and a writ was duly served on

the defendant in England. On March 17, 1913, Mr. Cruickshank, the defendant's advocate, appeared in Court, and the following note was made in the judge's book in accordance with the practice in the Isle of Man: "Mr. Cruickshank appears conditionally to set aside writ. Defendant to file motion to set aside writ." On March 31 the defendant gave notice of motion to set aside the writ and the order for service out of the jurisdiction on the grounds "(1.) that the Rules of the Isle of Man High Court of Justice, 1884, do not contemplate or authorise service out of the jurisdiction; (2.) that no cause of action arose or exists within the jurisdiction of these Courts; (3.) the defendant is domiciled in England and has never had a domicil in the Isle of Man." Counsel for the parties having been heard, the motion was dismissed. The defendant took no further part in the proceedings. On June 30 an interlocutory judgment was given in the following terms: "Upon hearing the plaintiff's motion in the within-styled action for an interlocutory judgment against the defendant and for an order for a jury to assess the damages (if any) payable by the defendant to the plaintiff: and the defendant John Taylor having failed to appear or enter an appearance to the writ of summons in the action which has been duly served on him: and upon consideration had thereof It is ordered that the defendant John Taylor do pay to the plaintiff damages in respect of his claim for loss of the society and services of his wife Amy Margaret Harris and for defendant's criminal conversation with her."

The case then came before a jury who returned a verdict for 800*l.* damages. Final judgment was entered for the plaintiff for 800*l.* and costs. The judgment contained the following recital: "the defendant who is resident out of the jurisdiction but upon whom a writ of summons in the action has been duly served not having filed or delivered any defence nor appearing to the action."

The plaintiff claimed in the present action 800*l.* and 62*l.* 10*s.* 5*d.*, the amount of the taxed costs.

Various points were raised by the defence, but the only points dealt with in the Court of Appeal and necessary to refer to in this report were that the defendant was not at any material

C. A. 1915

HARRIS v. TAYLOR.

time either resident or domiciled in the Isle of Man, that he had not submitted to the jurisdiction of the Isle of Man Court, and that he did not appear in or defend the action.

Evidence was given by Manx lawyers at the trial as to the rules of procedure in actions in the Isle of Man. The effect of their evidence is stated in the judgment of Buckley L.J.

Bray J. gave judgment for the plaintiff on the ground that the defendant by "conditionally" appearing in the Isle of Man Court and applying to set aside the writ and the order for the service of the writ out of the jurisdiction had voluntarily submitted himself to the jurisdiction of the Court within the fourth rule in *Emanuel* v. *Symon*. (1) The learned judge was further of opinion, though he stated it was not necessary to decide, that the action was maintainable for the reasons given by Scrutton J. in *Phillips* v. *Batho* (2), but as the Court of Appeal gave no decision on this point the facts and arguments relating to it are omitted from this report.

Cyril Atkinson, K.C., and *T. B. Leigh* (*Boyd Merriman* with them), for the defendant. The defendant is not bound by the judgment recovered in the Isle of Man, the Courts there having no jurisdiction over him. Dicey on Conflict of Laws, 2nd ed., p. 361, states the three cases in which the Courts of a foreign country have, in an action in personam, jurisdiction, the material one for the present purpose being the third: "Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, submitted to such jurisdiction, i.e., has precluded himself from objecting thereto (*a*) by appearing as plaintiff in the action, or (*b*) by voluntarily appearing as defendant in such action without protest, or (*c*) by having expressly or impliedly contracted to submit to the jurisdiction of such Courts." On p. 68 "foreign country" is defined as meaning any country which is not England. Therefore, for this purpose the Isle of Man is a foreign country. In England, under Order XII., r. 30, a defendant may, without obtaining an order to enter a conditional appearance, serve notice of motion to set aside the service of the writ upon him. There is no such procedure in the

(1) [1908] 1 K. B. 302. (2) [1913] 3 K. B. 25.

Isle of Man. The evidence shows that it is for the Deemster of the Court to say whether there has been an appearance or not, and in the present case he has construed the conditional appearance as not being an appearance in the action, because the judgment of June 30 was signed "in default of appearance." A defendant who conditionally appears in an action to move to set aside the service of the writ is not voluntarily submitting to the jurisdiction of the Court for all purposes: *Mayer* v. *Claretie* (1); *Keymer* v. *Reddy*. (2) A person who protests that a Court has no jurisdiction over him and takes a step to enforce that protest cannot be said to have consented to the jurisdiction of that Court for all purposes.

"A defendant, on the other hand, who appears only to protest against the jurisdiction of the Court certainly does not submit himself to its jurisdiction": Dicey on Conflict of Laws, 2nd ed., p. 370. If the defendant "voluntarily appears and takes the chance of a judgment in his favour he is bound": *Schibsby* v. *Westenholz* (3); approved in the Court of Appeal: *Voinet* v. *Barrett*. (4) This is what is meant when it is said that a defendant is bound "where he has voluntarily appeared": *Rousillon* v. *Rousillon* (5); *Emanuel* v. *Symon*. (6) An appearance under protest—which has the same effect as a conditional appearance—is not a voluntary submission to the jurisdiction for all purposes: *Ringland* v. *Lowndes* (7); *Davies* v. *Price* (8); *Boissière* v. *Brockner*. (9) [They also referred to *Jefferys* v. *Boosey* (10); *Ashbury* v. *Ellis* (11); *Eschger* v. *Morrison*. (12)]

Greer, K.C., and *A. M. Latter*, for the plaintiff. If a defendant voluntarily appears in an action in a foreign Court which prima facie has no jurisdiction over him, he is taken to have submitted to the jurisdiction of that Court for all purposes. An appearance is none the less voluntary because it is made under

(1) (1890) 7 Times L. R. 40.
(2) [1912] 1 K. B. 215.
(3) (1870) L. R. 6 Q. B. 155, at p. 162.
(4) (1885) 55 L. J. (Q.B.) 39, at p. 41.
(5) (1880) 14 Ch. D. 351, at p. 371.
(6) [1908] 1 K. B. 302, at p. 309.
(7) (1864) 17 C. B. (N.S.) 514.
(8) (1864) 34 L. J. (Q.B.) 8.
(9) (1889) 6 Times L. R. 85.
(10) (1854) 4 H. L. C. 815, at p. 926.
(11) [1893] A. C. 339.
(12) (1890) 6 Times L. R. 145.

C. A. 1915

HARRIS v. TAYLOR.

protest: *Voinet* v. *Barrett* (1); *Boissière* v. *Brockner* (2); *Russell* v. *Smyth.* (3) A defendant who appeals to a Court to decide that it has no jurisdiction over him cannot, when the decision has been adverse to him, be afterwards heard to say that he has not voluntarily submitted to the jurisdiction of that Court. The passage cited from p. 370 of Dicey's Conflict of Laws does not correctly state the law. It purports to be founded on two cases, *Davies* v. *Price* (4) and *Ringland* v. *Lowndes* (5), which were cases dealing with arbitrations, not foreign judgments, and it is admittedly inconsistent with what was laid down by Cave J. in *Boissière* v. *Brockner.* (2) It is said that the official record of the interlocutory judgment conclusively shows that the defendant did not appear in the action, for the judgment is stated to have been in default of appearance. But the evidence of the Manx lawyers showed that there is no such thing in the Isle of Man as a judgment in default of appearance. The plaintiff there always has to attend in Court and prove his case, as is done in the county court in England. The only case in which the Rules of the Isle of Man Court provide for a judgment in default is where there is a default in delivery of a defence, and that is what occurred in this case. The defendant's appearance in Court by his advocate on the occasion of his motion might according to Manx law be treated by the Court as an appearance for all purposes.

Cyril Atkinson, K.C., in reply referred to *Sirdar Gurdyal Singh* v. *Rajah of Faridkote.* (6)

BUCKLEY L.J. This is an appeal against a judgment of Bray J. given in an action brought to enforce a judgment obtained by the plaintiff against the defendant in an action in the Isle of Man. In that action the plaintiff claimed damages for criminal conversation by the defendant with the plaintiff's wife, and for the loss of the society and services of his wife. The plaintiff was domiciled and resident in the Isle of Man; the defendant was resident in England and prima facie was not subject to the jurisdiction of the Isle of Man Court, and the question which

(1) 55 L. J. (Q.B.) 39.
(2) 6 Times L. R. 85.
(3) (1842) 9 M. & W. 810.
(4) 34 L. J. (Q.B.) 8.
(5) 17 C. B. (N.S.) 514.
(6) [1894] A. C. 670.

arises on this appeal is whether the defendant so acted as to submit to the jurisdiction of the Court of the Isle of Man. In order to decide this question it is necessary to consider carefully the rules of procedure which govern legal proceedings in the Isle of Man. An action in that island is not commenced by the issue of a writ. Order II., r. 1, of the Rules of 1884 of the High Court of Justice, Isle of Man, provides that "every action in the High Court, hereinafter called 'the Court,' shall be commenced by filing in the Rolls Office a concise statement of the nature of the claim made, or of the relief or remedy required in the action." In this case the plaintiff by his legal adviser on December 17, 1912, made his statement of claim as follows: "The plaintiff's claim is for damages for loss of the society and service of his wife Amy Margaret Harris and for criminal conversation with her." That statement of claim was filed in Court on December 27, 1912, and according to the practice of the Isle of Man that constituted the commencement of the action. The action is then listed and comes before the Court on an appointed day. Order VIII., r. 2, provides that: "In any case not of a criminal nature, if the summons be served personally upon a defendant, or it appear to the satisfaction of the Court that the fact of such summons having been issued and having been attempted to have been served, has come to the knowledge of a defendant three days at least before the day on which such summons required him to appear, the cause may proceed and be determined in his absence, or may be adjourned or otherwise as to the Court may seem fit."

When this action first came into the list the defendant had not been served and he did not appear in Court, and the plaintiff applied ex parte for leave to issue a writ and to serve it on the defendant out of the jurisdiction. Leave was given; a writ was issued on February 21, 1913; and it was duly served on the defendant in England. On March 17, 1915, the defendant by his advocate (Mr. Cruickshank) appeared in Court, and the following is the official record of what took place: "Mr. McWhannell for plaintiff. Mr. Cruickshank appears conditionally to set aside writ. Defendant to file motion to set aside writ." The evidence given by the Isle of Man lawyers shows that in the Isle

C. A. 1915

HARRIS v. TAYLOR.

Buckley L.J.

of Man an appearance in an action is not entered in the same way as in this country. When a cause has been entered in the list the defendant appears in Court either in person or by his advocate and a note of his appearance is made by the Deemster in his book, and that is what was done in this case. On March 31 the defendant gave notice of motion "to set aside the order for service out of the jurisdiction of this Court upon defendant granted by His Honour Deemster Callow on February 21, 1913, and the writ of summons issued thereunder on the following grounds:—1. That the Rules of the High Court of Justice, 1884, do not contemplate or authorise service out of the jurisdiction in actions for tort. 2. That no cause of action arose or exists within the jurisdiction of this Court. 3. That defendant is domiciled in England and has no domicil in the Isle of Man and never has had such last mentioned domicil." On April 23, counsel for the plaintiff and the defendant having been heard, this motion was dismissed with costs. Subsequently on May 19 the plaintiff gave notice of motion for interlocutory judgment and for an order for a special jury to assess the damages (if any) payable to the plaintiff under Order XIX., r. 4. That rule provides that: "If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant or all defendants, if more than one, make default as mentioned in rule 2, the plaintiff may obtain an interlocutory judgment against the defendant or defendants, and the Court shall thereupon direct a jury to assess the value of the goods, and the damages, or the damages only, as the case may be." Referring back to r. 2 of Order XIX. it is as follows: "If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may, at the expiration of such time, obtain judgment for the amount claimed, with costs." Therefore, in a case which comes under Order XIX., r. 4, the defendant makes default if he does not deliver a defence. The cases in which a defence is required are dealt with in Order XIV., rr. 6 and 7, and they are two, one where a statement of case has been delivered to a defendant, and the other, under r. 7, which says that "a defendant who

has appeared in an action, and who has neither received nor required the delivery of a statement of case, must deliver his defence (if any) at any time within ten days after his appearance, unless such time is extended by the Court." Therefore, if a defendant appears in an action an interlocutory judgment can be obtained against him in default of defence. The interlocutory judgment was delivered on June 30, and was in the following terms: [The Lord Justice read the interlocutory judgment as set out above.]

The interlocutory judgment as drawn up was on its face a judgment in default of appearance and not in default of defence. A point has been raised with regard to that with which I will deal in a moment. The case then came before a jury. The claim was confined to damages for criminal conversation, and the jury gave a verdict for 800*l.* damages. Final judgment was entered for the plaintiff in accordance with the verdict for 800*l.* and costs. The judgment contained the following recital: "the defendant who is resident out of the jurisdiction but upon whom a writ of summons in the action has been duly served not having filed or delivered any defence nor appearing to the action." That is the history of the proceedings in the Isle of Man Court.

The question which we have to decide on this appeal depends, as I have said, on whether the defendant submitted to the jurisdiction of the Isle of Man Court, and in order to decide that question it is necessary to consider what it was that the defendant did on March 17, when as the record states he appeared conditionally to set aside the writ. When the defendant was served with the process he had the alternative of doing nothing. He was not subject to the jurisdiction of the Court, and if he had done nothing, although the Court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the Court. But the defendant was not content to do nothing; he did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the Court and contended that the Court had no jurisdiction over him. The Court, however, decided against this contention and held that the defendant was amenable to its

C. A. 1915

HARRI- v. TAYLOR.

Buckley L.J.

jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that Court. If the decision of the Court on that occasion had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it and it became his duty to appear in the action, and as he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so. The course adopted by the defendant's advocate on March 17 was either a qualified appearance or an unqualified appearance. If it can be regarded as a qualified appearance, it was an appearance for the purpose of getting a decision of the Court on the question whether the defendant was bound by the jurisdiction of the Court. The decision was against him, and thereafter it was not open to the defendant to say that he was not bound. The doctrine applicable to these cases is that if the defendant has placed himself in such a position that it has become his duty to obey the judgment of the foreign Court, then the judgment is enforceable against him in this country: see *Schibsby* v. *Westenholz*. (1) I think that in this case the defendant did submit himself to the jurisdiction of the Court of the Isle of Man, and, therefore, it was his duty to obey the judgment.

It remains to notice a point which was made with regard to the form in which the interlocutory judgment was drawn up, though I do not think it is a point of much importance. The judgment contains these words: "The defendant John Taylor having failed to appear or enter an appearance to the writ of summons in the action which has been duly served on him." I think that must be read as being an interlocutory judgment in default of defence, and that the words "having failed to appear" refer to the failure of the defendant to appear in the Court and to his failure to enter a formal appearance as he ought to have done after the judgment which was given on April 23, dismissing his motion. In this way the interlocutory judgment can be made consistent with the practice and with the final judgment. But, as I have said, the point is not an important one, because according to the practice in the Isle of Man the Deemster was entitled to treat the

(1) L. R. 6 Q. B. 155.

appearance of the defendant on his motion to set aside the service and to dismiss the action as an appearance in the action for all purposes.

For these reasons I am of opinion that the defendant submitted himself to the jurisdiction of the Isle of Man Court, and this Court will therefore recognize the judgment as one which was properly obtained against him and which can be enforced in this country. It, therefore, becomes unnecessary to consider the second point or the decision of Scrutton J. in *Phillips* v. *Batho*. (1)

The appeal will be dismissed.

PICKFORD L.J. I agree. I do not think the case is an easy one to decide. Prima facie, the Isle of Man Court had no jurisdiction over the defendant because he was not resident on the island, and could not become subject to the jurisdiction of that Court, unless he submitted to it. The word submission in this connection is not confined to cases where there has been an intentional and voluntary submission to a Court in order to obtain a decision on the main question in dispute between the parties. The procedure in an action in the Isle of Man is this. A document called a statement of claim is filed, and the case is called on in Court. The defendant may or may not be present. If he is, no difficulty arises; he has to put in a defence. If he is not present, certain process follows, and if the defendant is not resident in the Isle of Man it is necessary for the plaintiff to obtain an order for service of a writ out of the jurisdiction. That is what was done in this case, and the defendant's advocate subsequently applied to the Court to have the service of the writ out of the jurisdiction set aside on various grounds. That application was heard by the Court and was dismissed. Then the plaintiff signed an interlocutory judgment, and obtained a writ of inquiry for the assessment of the damages by a jury. The interlocutory judgment as drawn up does undoubtedly state that the defendant had failed to appear or to enter an appearance to the writ of summons which had been duly served on him. The jury having assessed the damages, final judgment was entered

(1) [1913] 3 K. B. 25.

C. A. 1915

HARRIS v. TAYLOR.

Pickford L.J.

for the amount of the verdict, and the judgment recites that the defendant had not filed or delivered any defence and had not appeared to the action. It is contended for the defendant that that shows that what happened when the defendant applied to set aside the service of the writ does not constitute an appearance in the action. On the other hand it is argued that the Court must be taken to have treated it as an appearance because the Court had no power to give an interlocutory judgment in default of appearance, but only in default of defence, and therefore the interlocutory judgment must be taken to have been a judgment in default of defence. It is not quite clear what the practice of the Isle of Man Court is in this matter, and it is certainly somewhat curious that if there is no power to sign judgment in default of appearance the book of the practice should contain a form for such a judgment. But I do not think the point is of much importance, for the time for delivering a defence had expired and there had been a default. I am inclined to think, though I am not sure, that the Court treated the defendant's appearance on his motion as in the nature of a conditional appearance, but the point is not in my view of any importance because the evidence shows that if the appearance was only intended as a conditional appearance the Court had power in its discretion to treat it as an appearance to the action; and if a defendant applies to a Court to set aside the service of a writ under which judgment could be obtained against him, and the Court is one which has power to treat that application as constituting an appearance to the action, that in my opinion amounts to such a submission on the part of the defendant to the jurisdiction of the Court as renders him liable to obey the judgment of the Court. In my opinion the defendant did submit to the jurisdiction of the Isle of Man Court, and, therefore, the judgment of that Court is enforceable against him in the Courts of this country.

It is unnecessary to say anything as to the second point.

BANKES L.J. I agree. The precise point in this case does not seem to have arisen for decision previously, but the principles which underlie all these cases apply. I think that

there is great doubt whether the defendant's motion to set aside the service of the writ was a technical appearance to the action, but it was undoubtedly an application by the defendant for the exercise of the protection of the Court on his behalf. The question is whether the defendant having taken that step has brought himself under an obligation to obey the ultimate judgment of the Court. The rules under which the Courts of this country enforce the judgments of foreign Courts have been laid down in numerous cases. In *Schibsby* v. *Westenholz* (1) Blackburn J. said "the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke B. in *Russell* v. *Smyth* (2), and again repeated by him in *Williams* v. *Jones* (3), that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."

Therefore, the question which always has to be considered is whether the foreign Court is as regards the defendant a Court of competent jurisdiction, and the following are instances of cases in which the foreign Court is a Court of competent jurisdiction, namely, where the defendant was at the commencement of the action resident in the foreign country, or where at the time of judgment he is a subject of the Sovereign of that country or where he has by voluntarily appearing in the action submitted to the jurisdiction of its Courts. It is true that in most of the cases in which this question has arisen the appearance of the defendant has been an appearance in the technical sense, but in my opinion there may in other ways be a voluntary submission to the jurisdiction of a foreign Court, for the principle underlying the case of a person resident in the foreign country or of a person who has agreed to submit to the jurisdiction of its Courts applies equally to the case of a person who appeals at a preliminary stage to the foreign Court to relieve him from an obligation which the plaintiff by means of the action seeks to put upon

(1) L. R. 6 Q. B. 155, at p. 159. (2) 9 M. & W. 810, at p. 819.
(3) (1845) 13 M. & W. 628, at p. 633.

C. A. 1915

HARRIS v. TAYLOR.

Bankes L.J.

him. In *Carrick* v. *Hancock* (1) it was held that the fact that the residence of the defendant in the foreign country was merely temporary was not sufficient to oust the jurisdiction of the Courts of that country over him. Mr. Arthur Cohen in arguing that case said that "as a man would be protected from being robbed while passing through a foreign country so also he was liable to the jurisdiction of its Courts," and Lord Russell of Killowen C.J. in giving judgment said that in his opinion the "duty of allegiance was correlative to the protection given by a State to any person within its territory. This relationship and its inherent rights depended upon the fact of the person being within its territory. It seemed to him that the question of the time the person was actually on the territory was wholly immaterial." It seems to me that if the duty of allegiance exists in a case like that where a mere temporary protection of the law of the foreign Court is enjoyed, the case is far stronger when a defendant actually appeals to a foreign Court to relieve him from a liability which the plaintiff by his action seeks to place upon him. The fact that the defendant has sought the protection of the Court imposes upon him an obligation to obey the judgment of the Court if it should happen that it is given against him. It is in my opinion an entire misconception of the principle applicable to these cases to say that there is a voluntary submission to the jurisdiction of a foreign Court only when the defendant by appearing in the action in the technical sense has consented to the jurisdiction.

Appeal dismissed.

Solicitors for plaintiff: *Ridsdale & Son, for John Gardner, Liverpool.*

Solicitor for defendant: *Grundy, Kershaw, Samson & Co.*

(1) (1895) 12 Times L. R. 59.

F. O. R.

THE KING *v.* TAYLOR.
THE KING *v.* AMENDT.

1915
March 15, 16, 26.

Licensing Acts—Monopoly Value—Alteration of—New Licence—Grant of, where a similar Licence already in force—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *ss.* 12, 16.

A new licence to sell intoxicating liquors cannot be granted in respect of premises in respect of which there is a similar licence, that is to say, a licence to sell the same kinds of intoxicating liquor, in force at the date of the application. A licence granted under such circumstances, though in form a new licence, is in substance a licence by way of renewal, and consequently cannot contain conditions as to payment of monopoly value different from those contained in the original licence.

Quaere whether justices can grant a licence subject to a condition that the payments on account of monopoly value shall be made for an indefinite number of years.

RULES for certiorari to quash the grant and confirmation of two licences for the sale of intoxicating liquors.

THE KING *v.* TAYLOR.

In the year 1905 a full publican's licence was granted by the licensing justices to the respondent, H. Taylor, in respect of the Heathcote Arms, Leytonstone, and the conditions indorsed on the licence provided that the licensee for the time being should pay on account of the monopoly value of the licence the sum of 200*l.* per annum for the first five years, commencing on April 5, 1906, the sum of 300*l.* per annum for the next five years, and thereafter 400*l.* per annum. The licence was duly renewed in every year down to and including 1912, and was in force up to April 5, 1913. Having regard to the amount of the trade done on the premises the monopoly value imposed turned out to be excessive, and in 1913 the licensee gave notice in accordance with s. 15 of the Licensing (Consolidation) Act, 1910, of his intention to apply to the justices at the general annual licensing meeting at Stratford on February 8, 1913, for a new licence in respect of the premises. The object of applying for a new licence instead of a renewal was to obtain a reduction of the monopoly value, there being no provision in the Act for allowing

1915

REX v. TAYLOR.

such a reduction upon a renewal. The justices granted the application at a monopoly value of 100*l.* per annum for the next four years down to 1917, after that date rising to 150*l.* per annum. At the same time, in order to provide against the premises being unlicensed in the event of the new licence not being confirmed till after April 5, when the old licence would in the ordinary course expire, they renewed the old licence, subject to the condition that it should be surrendered if and when the new licence was confirmed, and that condition was subsequently performed.

A rule was obtained on behalf of the Crown calling on the defendant to show cause why the new licence so granted to him should not be quashed on the ground that the justices had no jurisdiction to grant it, as there was no power to alter a monopoly value which had once been fixed.

A. F. Wootten and *C. Bennett* showed cause. It is conceded that the justices have no power to alter the monopoly value of a licence upon an application for its renewal. But under s. 14 of the Licensing (Consolidation) Act, 1910, it is clear that when granting a new licence they may attach such a monopoly value to it as they think just. The question is whether a licence holder who is dissatisfied with the monopoly value attached to his licence may obtain a revision of it by applying for and obtaining a new licence in lieu of a renewal of the old one. It is contended that he can. By s. 12 a new licence is defined to be "a justices' licence granted at a general annual licensing meeting otherwise than by way of renewal or transfer as defined by this Act." The definition of a renewal of a licence is given by s. 16, and means "the grant of a justices' licence at a general annual licensing meeting by way of renewal of a similar licence which is in force in respect of the premises at the date of the application." In the present case it is not disputed that there was a licence in force at the date of the application, and that it was a similar licence, for it also was a full publican's licence, and it also was for the period of a year. But the application for the licence was not by way of renewal. It was in form an application for a new licence;

the respondent had given the notices required by s. 15 on an application for a new licence; and in so applying for a new licence he ran the risk of having his monopoly value increased, and if it had been so increased he could not then have fallen back on his existing licence, for as it was not an "old on-licence," having been first granted since 1904, the justices had an absolute discretion to refuse to renew it.

THE KING *v.* AMENDT.

In 1906 a full publican's licence was granted to the respondent Amendt as an annual licence in respect of the refreshment rooms at the Great Eastern Railway Station at Witham, subject to the condition "that the licensee for the time being" should pay on account of monopoly value 30*l.* a year for the first five years and thereafter 40*l.* a year. The licence was renewed every year down to 1913, when the respondent, finding that the monopoly value was greater than was warranted by the receipts from the trade done, applied for a new licence. On March 11, 1913, the justices granted him a new licence for a term of five years from April 5, 1913, with a monopoly value of 15*l.*, and renewed the existing licence on the terms that it should be surrendered as soon as the new licence was confirmed. On April 16 the new licence was confirmed and the old one surrendered.

Ryde, *K.C.*, and *C. E. Jones* showed cause. The respondent relies upon the same contention as that urged in *Taylor's Case*, that the licence sought to be quashed was in form a new licence and did not purport to be "by way of renewal." But it is further contended that the licence could not possibly be by way of renewal, for the licence of which, on the Crown's contention, it was a renewal was itself void, and a void licence cannot be renewed. The monopoly value of the earlier licence as fixed by the justices was 30*l.* a year for the first five years and thereafter 40*l.* a year for an indefinite number of years. In *Rex* v. *Customs and Excise Commissioners* (1) it was held by the Court of Appeal that the monopoly value is a definite lump sum to be ascertained once for all, and

(1) [1914] 2 K. B. 390.

1915

REX v. AMENDT.

that the justices when granting a licence have no jurisdiction to omit its ascertainment. Here the justices could not have ascertained the lump sum monopoly value. There was no provision for the payment of any definite number of annual sums. The annual payment was to be made by "the licensee for the time being." But the licence might at any time be dropped and the annual payments would thereupon come to an end. Therefore the grant of the old licence was void, and there was nothing to renew. Further the new licence in this case, even if it is by way of renewal, is not by way of renewal of "a similar licence." The old licence was for a year, the new one for a term of five years. A licence for a term of years is not similar to an annual licence.

Sir John Simon, A.-G., Sir Stanley Buckmaster, S.-G., and *Daldy,* in support of the rules. The provision in the old licence that the monopoly value should be paid by annual instalments did not make the licence void. The decision in *Rex* v. *Customs and Excise Commissioners* (1) was nothing more than that the capital value of the monopoly must be fixed by the justices before they grant the licence. The justices in that case were held to have acted without jurisdiction because it was clear that they had not so fixed the capital sum, the annual amount payable in respect of the monopoly value being made to vary from year to year with the takings of the particular year. The Court never decided that the monopoly value must be paid in one lump sum. The Act plainly contemplates that it may be paid by a series of payments. The only condition is that, by s. 14, sub-s. 1 (*b*), the amount of the payments must not exceed the amount required to secure the monopoly value. There is no difficulty in ascertaining the present value of an annual charge payable in perpetuity, and conversely, when the present value of a monopoly has been first ascertained, there is no difficulty in arriving at the amount of the annual payments in perpetuity which in the aggregate will correctly represent that value. If for some reason or other the licence be dropped after it has run for a year or two the monopoly value will not be lost. It will still be available to the public on a regrant of the licence to

(1) [1914] 2 K. B. 390.

somebody else. Nor did the Court of Appeal in the case referred to decide that the capital sum must be specified in the licence. It is enough if the justices have fixed it in their own minds, and have then gone on to attach to the licence the conditions which they think best adapted to secure the monopoly value so arrived at to the public. There is nothing to show in the present case that the justices had not fixed the capital value in their own minds and made it the basis of the payments imposed. Therefore the contention that the old licence was void and could not be renewed fails. The so-called new licence was in fact a renewal of the old one; it satisfied both the conditions of s. 16; it was "by way of renewal of a similar licence." The licence was "a similar licence," for they were both full publicans' licences. The fact that in *Amendt's Case* they were for different periods is immaterial. The similarity referred to in the section has reference to the kinds of intoxicating liquors licensed to be sold and the place where they are to be consumed, and not to the period for which the licence is to run. This becomes perfectly clear when one examines the historical origin of the expression "a similar licence." In the Licensing Act, 1872 (35 & 36 Vict. c. 94), a new licence was defined by s. 74 to be "a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors," and by the same section a renewal of a licence was defined to mean "a licence granted at a general annual licensing meeting by way of renewal." In the following year a case of *Marwick* v. *Codlin* (1) came before the Court in which the question for decision was whether a full publican's licence when granted in respect of premises theretofore licensed for the sale of wine and beer only was a new licence and required confirmation. It was held that it was, and that the words "not theretofore licensed" in the section meant "not theretofore licensed for the sale of intoxicating liquor of the same kind to which the new licence extends." That decision was embodied in the amending Act passed in the following year, the Licensing Act, 1874 (37 & 38 Vict. c. 49), by s. 32 of which the definition of a "new licence" was altered to "a licence for the sale of any intoxicating liquor granted at

(1) (1874) L. R. 9 Q. B. 509.

1915

REX v. AMENDT.

a general annual licensing meeting in respect of premises in respect of which a similar licence has not theretofore been granted." It is from that section that the expression "a similar licence" in the present Act comes, while the expression "by way of renewal" comes from s. 74 of the 1872 Act. But the Act of 1910 being a consolidating Act was not intended to alter the law by attaching any different meaning to those expressions. If the respondent's contention were right and a licensee, the monopoly value of whose licence was excessive, could get that value reduced by the expedient of taking a grant of a new licence instead of a renewal of the old one, he would as compared with the Crown be placed in an unduly favourable position, for the Crown, in the event of the monopoly value turning out to have been fixed too low, has no corresponding right to ask to have it increased; and the rights of the parties in that respect ought to be mutual.

Cur. adv. vult.

March 26. LORD READING C.J. read the following judgment:— The respondents, Taylor and Amendt, showed cause against a rule obtained by the Attorney-General to quash two orders made by the confirming authority for the county of Essex whereby they confirmed the grant by the licensing justices of a new licence to each of the respondents.

The facts, so far as material, are as follows: In 1905 the respondent Taylor obtained a new licence in respect of premises occupied by him. Under s. 4 of the Licensing Act, 1904, now s. 14 of the Licensing (Consolidation) Act, 1910, a new licence was granted subject to conditions of payment for monopoly value of the licence. The licence was a full publican's licence, and the conditions of payment were 200*l.* per annum for the first five years, 300*l.* per annum for the next five years, and thereafter the sum of 400*l.* for every year. There were restrictions and other conditions which are not material to the point now raised. The licence granted was an annual licence, and every year till 1913 application was made for the renewal of the licence, and the renewal was granted. In February, 1913, application was made on behalf of Taylor for a new licence in respect of the same premises.

The justices intimated that they were disposed to grant a new licence with a revision of the monopoly value. Objection was taken on behalf of the Commissioners of Customs and Excise that such a licence would, in fact, be a renewal of the old licence, and in the circumstances could not be a new licence and could not be subject to the payment of a reduced monopoly value. The justices, however, granted a new licence subject to a reduction of monopoly value, namely, payment of 100*l.* per annum till 1917, and thereafter of 150*l.* per annum. The new licence was subject to the same restrictions and other conditions as the old licence, and the renewals of the same. Further, the justices provisionally renewed the existing licence on condition that the renewal should be surrendered on the confirmation of the grant of the new licence. On April 16, 1913, the confirming authority of the county confirmed the licence granted by the justices.

In 1906 the respondent Amendt obtained a new licence in respect of premises occupied by him subject to the conditions of payment for monopoly value of 30*l.* per annum for five years, and thereafter of 40*l.* per annum. The licence was a full publican's licence, and was renewed from year to year until 1913. In February of that year application was made on behalf of this respondent for a new licence in respect of the same premises. The same objection was taken on behalf of the Commissioners of Customs and Excise on March 11, 1913. On that date the justices granted a new licence for a term of five years at the monopoly value of 15*l.* on condition that the existing licence, which was provisionally renewed, should be surrendered immediately upon the new licence becoming effective. On April 16, 1913, the grant of this licence was confirmed by the confirming authority of the county.

In both these cases the effect of the grant of the new licence with revised conditions is to reduce the annual payments for monopoly value. It is clear law, and it is not in dispute, that when a licence has been granted with conditions attached for payment of monopoly value there is no jurisdiction in the justices to revise the conditions of payment attached to the licence or to the renewal of the licence. The

1915

REX v. TAYLOR. REX v. AMENDT.

Lord Reading C.J.

object of the respondents in applying for, and obtaining, a new licence instead of a renewal of the old licence was to enable the justices to impose new and reduced conditions of payment of monopoly value, and the question is whether there was jurisdiction in the licensing justices to grant these new licences, or in the confirming authority to confirm them. A new licence is a licence granted "otherwise than by way of renewal or transfer" (s. 12, sub-s. 1, of the Act of 1910). The renewal of a licence is a grant "by way of renewal of a similar licence which is in force in respect of the premises at the date of the application" (s. 16, sub-s. 1). This definition of a renewal embodied the law as it was before the passing of this consolidation statute. Under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 74, a renewal of a licence meant a licence granted at a general annual licensing meeting by way of renewal. As was said by Cockburn C.J. in *Marwick* v. *Codlin* (1), "A renewal of a licence is a repetition of an old one." By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 32, a new licence meant "a licence for the sale of any intoxicating liquor granted at a general annual licensing meeting in respect of premises in respect of which a similar licence has not theretofore been granted." The effect of these two statutory definitions is comprised in the definition in s. 16, sub-s. 1, of the Act of 1910. The applications for the new licences were made, and the licences were granted by the justices at a time when there were similar licences in existence, that is, licences of a similar class, in these cases full publicans' licences, in respect of the same premises. In form, the applications were not made by way of renewal, but were for new licences, which were therefore subject to confirmation by the confirming authority, but in truth they were applications for a repetition of the old licences. It appears to me that when there is at the time of the application a similar licence in force in respect of the same premises the justices cannot grant a new licence of a similar class in respect of the same premises; they can only grant a licence by way of renewal, and in that case cannot revise the conditions of payment of monopoly value. If the means adopted in these cases for the purpose of securing

(1) L. R. 9 Q. B. at p. 514.

a reduction of the terms of payment succeeded, the result would be that applications for new licences instead of renewals would only be made when it was reasonably certain that there would be a reduction in the terms of payment for monopoly value. There are no means by which the Commissioners of Customs and Excise could approach the licensing justices for the purpose of obtaining an increase in the payments. The Commissioners could not initiate proceedings for revising the conditions of payment, however great the increase might be in the value of the licence, although in the public interest they are entitled to be heard on the question of the payments to be imposed for the purpose of securing monopoly value to the public (Finance (1909-10) Act, 1910, s. 87). The monopoly value must be a definite capital sum ascertained by the justices once for all, and the conditions of payment to secure it must be fixed once for all when the licence is applied for, and before it is granted, and subject only to the power of reduction given to the Commissioners of Customs and Excise under s. 47 of the Finance (1909-10) Act, 1910. Once that capital sum has been ascertained by the justices they cannot alter it: *Rex* v. *Customs and Excise Commissioners.* (1) On the application for a new licence the licensing justices may grant the licence for a term, in which case no renewal is necessary (s. 14, sub-s. 2 (*a*)), or they may grant an annual licence subject to renewal. In either case such conditions shall be attached as the justices think are best adapted for securing to the public the monopoly value of the licence (s. 14, sub-s. 1 (*a*)). I do not think that a licence which is in fact a repetition of an old licence becomes in law a new licence merely because it is, in name or in form, a new licence. The character of a licence as defined by the statute cannot be varied merely by calling it a licence of a different character. In my judgment as soon as it is apparent that these licences were granted in respect of the same premises, and were of the same class as the existing licences, they cannot be new licences. Notwithstanding that they are in form new licences, they are in substance and in fact renewals of old licences. In both the present cases the new licences were granted on the terms of the surrender of the old licences

(1) [1914] 2 K. B. 390, at p. 399.

1915

REX v. TAYLOR.
REX v. AMENDT.

Lord Reading C.J.

as soon as the new licences became effective. This was done, presumably, in order that there might never be an interval of time during which no licence was in force in respect of the premises. At each of the stages of the application for the new licence care has been taken by the applicant to preserve the old licence in order that when he presented himself to the justices he could say in effect: "I have a licence in existence in respect of my premises, and it is a full publican's licence; in truth I want a renewal of my old licence, but I want to call it a new licence so that you may revise the terms of payment imposed upon me for monopoly value." In my judgment the licensing justices had no jurisdiction to grant these so-called new licences.

On behalf of the respondent Amendt Mr. Ryde took the further point that at the time of the application in 1913 for a new licence there was no similar licence in force in respect of the premises, inasmuch as the licence granted in 1906, and all subsequent renewals, were void according to the principles laid down by the Court of Appeal in *Rex* v. *Customs and Excise Commissioners*. (1) The argument, as I understood it, is that as that licence, and the renewals, did not fix a definite period for the payment of the annual sums to secure the monopoly value, it must be taken that the justices had not ascertained the capital value of the monopoly, or had not fixed payments representing a capital value, and that therefore the licence was void. I do not decide whether licences granted in such a form are within the powers of the licensing justices or not. Before arriving at a conclusion upon so important a point I should desire more information than is before the Court. In particular it appears to me that it would be desirable to learn how the justices arrived at the conditions of payment, and why they fixed no period of time for the continuance of the definite payments. It is, in my opinion, plain that the Court of Appeal did not in terms decide the point now raised, but it is said that it follows logically from the reasoning of the Court that licences granted subject to conditions of payment for an indefinite period of years are ex facie void, and that this Court must now so hold in respect of the

(1) [1914] 2 K. B. 390.

renewal licence last granted to Amendt before the date of his application in 1913 for the new licence.

In *Rex* v. *Customs and Excise Commissioners* (1) the Commissioners had refused to grant an excise licence on the ground that the justices' licence authorizing the grant of the excise licence was void. The justices had attached to the grant of the licence conditions providing that the annual payments to secure the monopoly value should be a percentage of each year's gross takings from the sale of intoxicants. It was held that the justices had no jurisdiction to grant licences with such conditions attached, inasmuch as it was apparent on the face of the licence that they had not first fixed a capital sum to represent the monopoly value of the licence, but had made the monopoly value dependent upon the future annual takings which would consequently vary according to the amount of liquor sold. The Court held that monopoly value could not be an indefinite sum varying in the future according to the annual trade of the premises, and that the Commissioners were justified in refusing the excise licence and that no mandamus should issue directing them to grant it. The objection to the licence was taken by the Commissioners in the exercise of their duty in the public interest. In the present case the holder of the licence, who obtained it in 1906 and annually renewed it, and has traded under licences in this form since 1906, and was trading under such a licence at the time of his application for the so-called new licence, and agreed to surrender it to the justices, and did surrender it, in exchange for the new licence, now comes forward in a Court of justice to say that these licences were all void. I do not think it is open to him to raise this contention before this Court on this application. A person who has upon his own application and for his own purposes and profit obtained a licence in this form, and made use of it when obtaining the new licence, is not entitled, when it appears to his own interest, and after having had all the advantages and benefit of the licence, to repudiate it as a valid licence, and to contend that it is void. In the words of Bowen L.J. in *Gandy* v. *Gandy* (2), "it would be playing fast and loose with justice if the Court allowed that."

(1) [1914] 2 K. B. 390. (2) (1885) 30 Ch. D. 57, at p. 82.

1915

REX v. TAYLOR.
REX v. AMENDT.

In my judgment the grant of the so-called new licences must be quashed and the rules must be made absolute in both cases.

BRAY J. read the following judgment:—The facts in these cases have been fully stated by my Lord, and I will not repeat them.

A good many questions were raised in the course of the argument in these cases. The more important were as follows: (1.) Whether in fact the justices when they granted the original licence did fix a capital monopoly value, and whether they can attach conditions to a new licence making the monopoly value payable annually but providing that the annual payments shall cease when the licences are no longer in force, and whether that can be the mode best adapted for securing the monopoly value to the public. (2.) If they cannot, whether licences so granted are void. (3.) Whether the licences granted here were granted by way of renewal. (4.) Whether a new licence (other than a re-grant under s. 14, sub-s. 2) can be granted in respect of premises then licensed with a similar licence. In my opinion it is not necessary for the Court to decide points (1.) or (2.), which are both important and difficult, because in my opinion it is not open to the respondents to raise them. They had obtained these licences and had had them renewed annually, and had had the benefits of them and made their applications to the justices for the licences now in dispute upon the footing that they were existing valid licences, and that they were to continue in force, and indeed were to be renewed, until their surrender. They treated them as existing valid licences, and we must also treat them as existing valid licences. I prefer not to express any opinion upon these two points.

It is also unnecessary to answer (3.) because for the reasons I am about to state the Court ought to quash the granting of these licences even if they were not granted by way of renewal.

It remains therefore to consider the fourth question. We are dealing here with on-licences. Can new on-licences be granted in respect of premises then having an on-licence? The on-licences which the justices have jurisdiction to grant under s. 9 may be divided into four classes: (1.) New licences. (2.) Re-

grants under s. 14, sub-s. 2. (3.) Licences by way of renewal. (4.) Licences by way of transfer. There are no others that I know of. We have not to deal here with (2.) or (4.); nor with (3.), for if these licences were granted by way of renewal they were clearly bad because the conditions as to the payment of monopoly value were altered. Then if the respondents are to succeed these must be new licences. What are new licences? If the definition clause in the Act of 1874 were still in force a new licence could not be granted because there was an existing similar licence, but this clause is repealed and s. 12, sub-s. 1, is substituted for it. Does that make any difference? If it be right to say that the on-licences which the justices have jurisdiction to grant must fall within one of the four classes I have mentioned, and the licences in question do not fall within three of them, then those licences in order to be valid must fall within the fourth class, namely, they must be new on-licences. What is the ordinary meaning of a new licence with respect to premises? Surely it means a licence granted in respect of premises which have not then a similar licence. These premises had a similar licence, consequently these licences were not new licences and the justices had no jurisdiction to grant them.

In my opinion the rule nisi to quash should be made absolute in both cases.

LUSH J. read the following judgment:—The short question in these two cases which we have to decide is whether the "new" on-licences which were granted and confirmed in 1913 in respect of premises in respect of which there were similar licences then in existence are valid licences. In my opinion they are invalid and there was no jurisdiction to grant them. It is, I think, clear that if a similar licence is in force no application can be successfully made for a new licence in respect of the same premises. A new licence is thus defined by s. 32 of the Act of 1874: a licence "in respect of premises in respect of which a similar licence has not theretofore been granted." Although by the Act of 1910 a new licence is now defined as "a justices' licence granted at a general annual licensing meeting otherwise than by way of renewal or transfer as defined by this Act," the change in the

1915

REX v. TAYLOR. REX v. AMENDT.

Lush J.

definition has not made any change in the law. If the licensee of an already licensed house applies for a similar licence to that already existing it must either be granted by way of renewal or it cannot be granted at all. If, therefore, these licences were really new licences they are void for the reason I have mentioned. If they were granted by way of renewal they are void because the conditions for securing the monopoly value were altered.

This would be sufficient to dispose of the cases, but Mr. Ryde in *Amendt's Case* contended that the existing licence was void when the new licence was granted and that therefore there was no similar licence in existence. This point was not open in *Taylor's Case*, because there the new licence would be void if the existing one was void, the alleged defect being common to both. In *Amendt's Case* it was not so as the new licence was for a fixed term of five years. The reason why Mr. Ryde said that the existing licence was void was this. It was decided in *Rex* v. *Customs and Excise Commissioners* (1) that if it appeared clear, as it did there, that the justices had secured a yearly payment only, as representing the annual as distinguished from the capital value, they had not dealt with or secured the capital monopoly value at all, which is what the Act requires should be secured, and that the conditions precedent to the grant of a licence had therefore not been complied with. It was said that as the annual payments in this case were only to be made as long as the licence existed or "by the licensee for the time being," which I think is the same thing, and were to continue to be payable without limit of time if the licence was continually renewed, it was equally clear that the capital monopoly value had not been considered or dealt with. I do not think it is necessary to say if this contention is well founded or not, because in my opinion it was not competent to the respondent to contend that the existing licence was void. He had before the justices contended that the licence was valid, and had even obtained a renewal of it, and had undertaken to surrender it when the new licence on more favourable terms was granted, and on that contention the new licence was granted. He accordingly continued to trade under the old or renewed

(1) [1914] 2 K. B. 390.

licence which he now says was void, and in pursuance of the undertaking he surrendered it in exchange for the new licence. In my opinion it is not now open to him to contend that the old licence was void. I feel some doubt whether a licensee can assert as against the Crown that the licence which he applied for and obtained and under which he has traded and which has not been declared void was void and so set up his own illegality. But be that as it may, I do not see how a party who has set up one contention in one Court and obtained an order on that contention and availed himself of it (this respondent actually obtained and traded under a renewal on this contention) can afterwards turn round in another Court and raise the opposite contention in order to obtain a decision from that second Court. To do that would, in the language of Bowen L.J. in *Gandy* v. *Gandy* (1), "be playing fast and loose with justice." This is what this respondent seems to me to be doing, and I do not think that he can do it. The justices have never considered an application by the respondent as a person who had no existing licence in respect of the premises. This is I think the answer to Mr. Ryde's argument. I confess I should feel some difficulty in saying that the method adopted in these licences of providing for an annual payment to last so long as a licence continues to be renewed can be said to be a method of securing a fixed and definite capital sum representing the monopoly value, especially having regard to s. 14, sub-s. 1 (*b*), of the Licensing (Consolidation) Act, 1910, which provides that the total payments shall not exceed that fixed sum. But it is unnecessary to decide the question.

For the reasons I have stated I think that the existing licence must, as against this respondent, be treated for the present purpose as valid. I think that the rules should be made absolute.

Rules absolute.

Solicitor for Taylor: *James Turner.*
Solicitor for Amendt: *E. Moore.*
Solicitor for the Crown: *Solicitor for Customs and Excise.*

(1) 30 Ch. D. 57, at p. 82.

J. F. C.

1914
Nov. 19.

WINTERBOTTOM *v.* ALLWOOD.

Adulteration—Analysis—Deterioration of Sample—Sealing up Sample—Impossibility of Analysis owing to Condition of Sample—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 14.

By s. 14 of the Sale of Food and Drugs Act, 1875, "the person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed . . . . offer to divide the article into three parts . . . . each part to be . . . . sealed or fastened up in such manner as its nature will permit . . . ."

On February 12, 1914, the respondent purchased from the appellant some tins of "sardines in olive oil." The appellant delivered to the respondent tins of sardines which in fact contained cottonseed oil instead of olive oil. The respondent opened the tins, and having put the contents into three jars which he covered with grease-proof paper and securely sealed, delivered one of the jars to the appellant. On the same day the respondent caused the contents of one of the jars to be analysed by the public analyst. There was no negligence in the sealing of the jars on the part of the respondent, and about a fortnight after the purchase of the sardines information was conveyed to the appellant as to the result of the analysis and as to the probability of legal proceedings being instituted against him.

The respondent subsequently laid an information against the appellant under s. 6 of the Act for selling to the prejudice of the purchaser a certain article of food, namely, the sardines in olive oil, which was not of the nature and quality of the article demanded, and on March 11 a summons in respect of the charge was served upon the appellant. The appellant did not send for analysis the jar delivered to him by the respondent until March 17, 1914, when owing to the condition of its contents they could not be analysed, and it was admitted that they were not capable of being analysed on March 11, the date of service of the summons :—

Held, that it was not necessary under s. 14 of the Act that the jar should be so sealed or fastened up that it would be capable of analysis at the time the summons was served on the appellant, and that as he had had a reasonable opportunity, if he so desired, of having the sample effectively analysed in order to check the analysis made by the public analyst, the prosecution would lie.

Case stated by the stipendiary magistrate for South Staffordshire.

1. On March 9, 1914, an information was laid under s. 6 of the Sale of Food and Drugs Act, 1875 (1), by the respondent Allwood,

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 3: "No person shall mix . . . . or order or permit any other person to mix . . . . any article of food with any ingredient or material so as to

an inspector under the Act for the borough of Wolverhampton, against the appellant for that "he, the appellant, on the 12th day of February, 1914, at 87, Cannock Road, Wolverhampton, in the county aforesaid, did sell to the respondent to the prejudice of the purchaser a certain article of food, to wit, sardines in olive oil, which was not of the nature, substance, and quality of the article demanded by the respondent, the purchaser thereof, the same containing 19 per cent. of cottonseed oil, the oil used being cottonseed oil instead of olive oil."

2. The information was first heard by the magistrate on April 1, 1914, and was adjourned until May 15, 1914, at the request of the appellant and by the direction of the magistrate for the purpose of obtaining an analysis from the chemical officers of the Commissioners of Inland Revenue.

3. On May 15, 1914, on the adjourned hearing of the information the magistrate adjudged that the appellant was guilty of the

---

render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed . . . . under" a penalty.

Sect. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty . . . . provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say,

"(1.) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof;"

Sect. 14: "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent."

Sect. 21: "At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness, and the parts of the articles retained by the person who purchased the article shall be produced . . . ."

1914

WINTER-BOTTOM v. ALLWOOD.

offence and ordered him to pay a fine of 1*l.* and 4*l.* 5*s.* 6*d.* costs of the prosecution.

4. Upon the hearing of the information the following facts were proved :—

(*a*) On February 12, 1914, the respondent purchased from the appellant nine tins of sardines (1) of the brand known as "Five o'clock Tea Brand" for the sum of 2*s.* 3*d.* On each of the tins there was a printed label wherein it was stated that the tins contained sardines in pure olive oil, the printed statement on the label being seen and read by both appellant and respondent before the purchase was made. The label was in the following words :—

"Five o'clock
Norwegian
Sardines
in pure olive oil
Packed in Norway."

(*b*) The respondent on the same date, after the purchase had been completed, notified the appellant of his intention to have the contents of the tins analysed, and opened them and divided the contents (both sardines and oil) of each separate tin into three parts and placed one of the parts from each tin into three jars and covered the tops of the jars with grease-proof paper and securely sealed the same and delivered one of the jars to the appellant.

(*c*) The respondent on the same day caused the contents of one of the jars to be analysed by the public analyst for the borough of Wolverhampton, who on February 26, 1914, delivered to the respondent a certificate which (so far as material) was as follows :—

"I the undersigned public analyst for the borough of Wolverhampton do hereby certify that I received on the 12th February, 1914, from Mr. G. F. Allwood a sample of 'sardines in olive oil' . . . . for analysis and have analysed the same and declare the result of my analysis to be as follows :—

"I am of opinion that the said sample contained the

(1) During the argument it was admitted by counsel for the appellant that the respondent asked for "sardines in olive oil."

percentage of foreign ingredient as under:—19 per cent. cotton-seed oil, the oil used being cottonseed oil instead of olive oil.

"No change had taken place place in the constitution of the sample that would interfere with the analysis. "E. W. T. Jones, F.I.C."

(*d*) The appellant caused the contents of the second of the jars to be analysed by William T. Rigby and Harry Silvester on March 17, 1914, but owing to the condition of the contents they were not able to make an analysis.

(*e*) The third of the jars was at the request of the appellant and by the direction of the magistrate sent on April 1, 1914, to the Commissioners of Inland Revenue for the purpose of analysis and was received by the chemical officers of the department on April 2, 1914, and the certificate given by them, dated April 27, 1914, was (so far as material) as follows:—

"The sample of sardines . . . . referred to in your letter of April 1st was received here on the following day. It was securely sealed.

"On opening the jar we found that the sardines were covered with mould growths and that no oil could be poured or drained away from the sardines.

"After removal of the mouldy portion of the sample the fish were treated with a solvent which extracted the oil natural to the fish together with any oil which the fish had absorbed.

"We have made an analysis of the extracted oil but we are unable to say from the results obtained whether cottonseed oil was or was not present in the sample."

(*f*) By reason of the fact that the sardines which were placed in the jars having from decomposition or other causes become dry and mouldy, and that no oil could be poured or drained away from the sardines, it was not possible either for the analysts consulted by the appellant or for the chemical officers of the Commissioners of Inland Revenue to make any effective analysis of the contents of the jars on the dates when the same were received by them respectively. (1)

(1) It was admitted that at the date of the service of the summons upon the appellant the contents of the jars were in such a condition as not to be capable of analysis.

1914

WINTER-BOTTOM v. ALLWOOD.

(*g*) The use of oil is required in the preparation of tinned sardines as an article of commerce in a state fit for carriage and consumption, and there was no evidence that cottonseed oil if so used is injurious to health.

5. On behalf of the appellant it was contended :

(*a*) That there was no evidence of any sale to the prejudice of the purchaser within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875.

(*b*) That the respondent had failed to comply with the provisions of s. 14 of the Sale of Food and Drugs Act, 1875, in that the contents of the tins had not been separated and fastened in such a manner as the nature of the case permitted, the contents of the tins not having been placed in the jars in such a manner as to admit of the oil being analysed at the date of the service of the summons or on the date when the information was first heard, namely, April 1, 1914, and that compliance with the provisions of s. 14 was a condition precedent to the prosecution of the proceedings. (1)

6. On behalf of the respondent it was contended (inter alia):

(*a*) That the article supplied was not of the nature, substance, and quality of the article demanded.

(*b*) That cottonseed oil is an inferior oil to olive oil.

(*c*) That the part delivered to the appellant and the part retained for future comparison each contained relatively the same quantities of fish and oil as the part submitted for analysis to the public analyst, and that each of those parts was marked and sealed and fastened up in such manner as its nature would permit.

(*f*) That the part delivered to the appellant on February 12, 1914, was of such a nature both as regards fish and oil as to have enabled him to procure an effective analysis, if he had taken the necessary steps at the time to have done so, inasmuch as information was conveyed to him at about a fortnight from the date of the purchase as to the result of the analysis of the public analyst and of the probability of legal proceedings being instituted,

(1) It was also contended before the magistrate on behalf of the appellant that as the sardines had not been separated from the oil they were incapable of separate analysis.

and he ought then to have taken steps to have his part analysed instead of waiting until after the service of the summons.

(*g*) That it was common knowledge that sardines in tins rapidly decompose after a tin has once been opened.

(*h*) That the prosecution could not be held responsible for any alteration, by way of decomposition or otherwise, which had taken place in the constituent parts of the article between the time when it was purchased and the time when the appellant's part was submitted for analysis to his analysts.

(*i*) That *Lowery* v. *Hallard* (1), relied upon by the appellant's solicitor, was not in point, and that that case dealt with the proper primary division of the article purchased into what should be three approximately equal portions.

(*j*) That the objection raised by the appellant's solicitor regarding the division and subsequent condition of the appellant's part had been definitely settled by *Suckling* v. *Parker* (2) and that the circumstances in the present proceedings were analogous to those which arose in that case.

(*k*) That it is not a condition precedent to a conviction that the portion delivered to the appellant and also the portion retained for future comparison should be in such a condition as to be capable of an effective analysis at a date some weeks after the purchase of the sample, and that the Sale of Food and Drugs Acts nowhere state that to be the case.

(*l*) That no negligence or want of care was proved on the part of the respondent in taking the necessary steps under the Sale of Food and Drugs Acts.

7. The magistrate was of opinion that on the facts he was entitled to find that the opinion expressed in the certificate of E. W. T. Jones, the public analyst for the borough of Wolverhampton, that the contents of the tins contained a large percentage of cottonseed oil was correct, and that the sale of the tinned sardines in the circumstances was a sale to the prejudice of the purchaser within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875, and that it was not a condition precedent to proceedings under the section that the contents of the tins should be so dealt with by the respondent as to admit of an effective analysis being

(1) [1906] 1 K. B. 398. (2) [1906] 1 K. B. 527.

1914

WINTER-BOTTOM v. ALLWOOD.

obtained on behalf of the appellant at the date of the service of the summons or by the chemical officers of the Commissioners of Inland Revenue pursuant to the provisions of s. 21 of the Sale of Food and Drugs Act, 1899.

8. The magistrate was further of opinion that in accordance with the decision in *Suckling* v. *Parker* (1) it was not necessary (as a condition precedent to a conviction) that after the period which had elapsed between the date of the purchase of the article (about five or six weeks) and the dates upon which one part was sent to the chemical officers and another part was submitted for analysis to the appellant's analysts those parts should then be in such a condition as to be capable of effective analysis, and that he was empowered to decide the case acting upon the certificate of the public analyst, Mr. Jones, and as in his (the magistrate's) opinion the article sold by the appellant was not sardines in olive oil, he convicted the appellant of the offence charged and fined him 20*s.* and 4*l.* 5*s.* 6*d.* costs.

The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law.

Maddocks, for the appellant. There was no evidence of a sale to the prejudice of the purchaser within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875, because the purchaser asked for tinned sardines and obtained tinned sardines. [After some further discussion he admitted that the purchaser must be taken to have asked for "sardines in olive oil."] But even admitting that the purchaser asked for "sardines in olive oil" the appellant committed no offence against the statute. The magistrate overlooked the proviso in s. 6 that no offence is committed where any matter not injurious to health is added because it is required for the preparation of the food as an article of commerce in a fit state for carriage or consumption.

The magistrate found that there was no evidence that the cottonseed oil was injurious to health. No offence is committed if the ingredient added is not the same as that on the label if it is not injurious to health. If an ingredient injurious to health is added, a remedy is provided by s. 3 of the Act of 1875.

(1) [1906] 1 K. B. 527.

1914

WINTER-BOTTOM v. ALLWOOD.

The jars which were delivered to the appellant and sent to the Commissioners of Inland Revenue were not sealed up in such a manner as their nature would permit within the meaning of s. 14 of the Act of 1875. The sealing ought to have permitted of an analysis being made on behalf of the appellant. In sealing the jars care ought to have been taken that the air was kept out. That neglect rendered it impossible for the appellant to produce evidence from his analysts.

It is admitted that at the date of the service of the summons the samples were not capable of analysis. The words "olive oil" are in the expression "sardines in olive oil" descriptive only of the manner in which the sardines may be prepared, and not of an article of food. The respondent did not buy the olive oil as an article of food and for the purpose of analysis. If he did, it was his duty to inform the appellant and to separate the oil so that it could be analysed. If he intended to take proceedings in respect of the oil as well as in respect of the sardines he ought to have separated the sardines from the oil.

The words "sealed or fastened up in such manner as its nature will permit" in s. 14 of the Act of 1875 mean that each part into which the article is divided shall be sealed or fastened up so far as its nature will permit for the purpose of analysis. Applying those words to the present case it follows that the jar ought to have been sealed up so far as it reasonably could be for the purpose of analysis. Whether it ought to have been hermetically sealed or not would be a question for the magistrate, who would decide whether it was reasonable that it should be so sealed. The question for the magistrate is whether the sealing is sufficient to preserve the article for the purpose of analysis by the vendor: *Suckling* v. *Parker* (1); *Lowery* v. *Hallard*. (2) The sample must be so sealed as to give the vendor a reasonable time for analysis, and the sealing in that manner must take place at the time the sample is taken. The question for the magistrate is whether the sealing is reasonably effective for the purpose for which the sample is being kept, and the sample must be in a condition to be analysed at the date of the service of the summons.

(1) [1906] 1 K. B. 527. (2) [1906] 1 K. B. 398.

1914

WINTER-BOTTOM v. ALLWOOD.

R. M. Montgomery, K.C., for the respondent, was not called upon.

RIDLEY J. In this case Mr. Maddocks has placed his argument before us on behalf of the appellant with ability and fairness and has taken two points on his behalf—(1.) that there was no evidence of a sale to the prejudice of the purchaser within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875, and (2.) that the sample delivered to him and that sent to the Commissioners of Inland Revenue for analysis were not properly sealed and fastened up. In my judgment neither point can prevail. The respondent asked for sardines in olive oil, and there were delivered to him nine tins of sardines, with labels stating that the tins contained sardines in pure olive oil. Samples were taken in the ordinary way and were fastened up, but before the appellant exercised his option of having an analysis made the article had so decomposed that an analysis could not be made. The same thing happened with regard to the sample sent for analysis by direction of the magistrate. As to the sample which the respondent caused to be analysed, the analysis showed that it contained 19 per cent. of cottonseed oil, the oil used being cottonseed oil instead of olive oil, although the labels stated that the tins contained sardines "in pure olive oil." It is said that there was no evidence of a sale to the prejudice of the purchaser because what he purchased was "tinned sardines," as stated in paragraph (4) (*a*) of the case, and he did obtain tinned sardines, but on an examination of the facts it appears that he asked not for "tinned sardines," but for "sardines in olive oil," and he did not obtain sardines in olive oil.

[The learned judge also dealt with the contention that there were two distinct purchases of sardines and oil, which had not been seriously pressed.]

The other point is, perhaps, a more important one. On behalf of the appellant it has been contended that the sample delivered to him and the sample which was ultimately sent by direction of the magistrate to the Commissioners of Inland Revenue were not properly sealed or fastened up in such manner as their nature

would permit. If they were not so sealed or fastened up the prosecution would fail. That is what was decided in *Suckling* v. *Parker* (1), where the case was remitted to the magistrate in order that he might find whether the article had been so sealed up. In the present case it is not necessary to remit the case because the findings seem to imply that the samples were properly sealed up in accordance with the Act, although they are not specifically directed to the point. The words of s. 14, "sealed or fastened up in such manner as its nature will permit," do not mean that the article is to be so sealed up that the air cannot enter and that the article will be imperishable and capable of analysis at the time when the vendor sends for analysis the sample which has been delivered to him or at the time when the vendor is served with the summons. Those words do not refer so much to the preservation of the article as to its nature. They mean that the article whether liquid or solid is to be sealed or fastened up in such manner as its nature will permit, with the exercise of reasonable care and circumspection. I think that the magistrate has found that this article was so dealt with. Paragraph 6 (*l*) of the case states that it was contended for the respondent that it was not proved that there was any negligence or want of care on his part in taking the necessary steps under the Sale of Food and Drugs Acts, and I think that it is a necessary part of the findings of the magistrate which are stated in paragraphs 7 and 8 that there was no negligence on the part of the respondent, and that the article had been properly sealed or fastened up, otherwise I do not see how he could have arrived at the decision there set out. The appeal must therefore be dismissed.

AVORY J. I am of the same opinion. I think it is important to make it clear that we are deciding this case upon the admissions of fact which were made during the course of the argument and upon our view of the findings of fact which are necessarily involved in the decision of the magistrate. On the first point taken for the appellant, that there was in this case no evidence of a sale to the prejudice of the purchaser because he asked for

(1) [1906] 1 K. B. 527.

1914

WINTER-BOTTOM v. ALLWOOD.

AVORY J.

tinned sardines and did in fact get tinned sardines, it is now clear that the case has to be read with this amendment of paragraph 4 (*a*), namely, "On February 12, 1914, the respondent asked the appellant for sardines in olive oil and was supplied with sardines in cottonseed oil." As soon as that admission was made, it was clear that there was a sale to the prejudice of the purchaser.

As to the second point taken on behalf of the appellant, namely, that each part of the substance purchased was not sealed or fastened up in such manner as to enable an analysis to be made as required by s. 14, it is necessary to make it clear that all that the Court is deciding is the question which was before the magistrate, namely, whether it is necessary under s. 14 that each part should be so sealed or fastened up that it will be capable of analysis at the time when the summons is served on the vendor. I take that to have been the real question before the magistrate for this reason: In paragraph 5 (*b*) of the case it is stated that the appellant contended that the respondent had failed to comply with the provisions of s. 14, in that the contents of the tins had not been separated and fastened in such a manner as the nature of the case permitted, the contents of the tins not having been placed in the jars in such a manner as to admit of the oil being analysed at the date of the service of the summons. The magistrate, dealing with that contention, has expressed his opinion in paragraph 7 that it was not a condition precedent to proceedings under s. 6 that the contents of the tins should be so dealt with by the respondent as to admit of an effective analysis being obtained on behalf of the appellant at the date of the service of the summons. In my opinion the magistrate was right in that view and properly determined that question. It appears to me that we must take the evidence in this case to have satisfied the magistrate, as appears from paragraph 6 (*f*), that information was in fact conveyed to the appellant about a fortnight after the date of the purchase as to the result of the analysis by the public analyst and as to the probability of legal proceedings being instituted. We must also take it that the magistrate was satisfied that there was no negligence or want of care on the part of the respondent in taking the necessary steps

under the Act, and therefore the appellant had an opportunity if he so desired, within a reasonable time after the purchase, of checking the analysis of the public analyst by having one made on his own behalf. I am not myself prepared to decide whether s. 14 does contemplate that the samples shall be so sealed or fastened up as to prevent any possibility of deterioration in the article. From the case of *Lowery* v. *Hallard* (1) it appears that the object of the section is that the vendor shall have an opportunity of having an effective analysis made. It is true that in that case the decision only proceeded upon the question of quantity, and the Court said that a sufficient quantity ought to be left with the vendor to enable him to have an effective analysis made in order to check the analysis made by the public analyst. The Court there did not deal with the question whether the article should be so sealed or fastened up that it would not deteriorate. But by analogy the object of the section being to give the vendor the opportunity of having the sample effectively analysed, if in this case I thought that upon the facts found it was not clear that the appellant had such an opportunity, I should be of opinion that the case ought to go back to the magistrate in order that he might determine whether a reasonable opportunity had been afforded to the appellant of having an analysis made. Having, however, come to the conclusion that there was evidence which satisfied the magistrate that the appellant had that opportunity, there is no reason for sending the case back, and I think that the second point also fails.

LUSH J. I agree. I only wish to say that as to the second point it is clearly a condition precedent to a prosecution under s. 6 that the purchaser should have taken the steps required by s. 14. The question is what those steps are. The section is silent as to the manner in which the duty of sealing or fastening up the portions of the article is to be performed. It may be said, so far as the language of the section is concerned, that the purchaser's duty is so to seal or fasten up the substance that liquid shall not escape. That is putting his duty at the

(1) [1906] 1 K. B. 398.

1914

WINTER-BOTTOM v. ALLWOOD.

Lush J.

lowest. It may also be said that his duty is so to seal or fasten it up that it will not deteriorate whatever its nature may be. That is putting it at the highest. But there is a third view, and I think it is the right one. The object of the performance of the duty is to enable the seller to have the article analysed and to enable the Court, if it thinks fit, to have the article analysed. That is shown by s. 21. Having regard to the object of the requirement and to the fact that s. 14 does not in clear terms state the method to be adopted, I think that the proper view is that the purchaser is to take reasonable care to have the portions so sealed or fastened up as to be capable of analysis at the proper time. That is, in effect, what the Court decided in *Lowery* v. *Hallard* (1) as regards quantity, and in that case Lord Alverstone C.J. said: "It is . . . . most important that there should be a proper opportunity of checking or correcting any analysis made by the public analyst." Just as it is necessary to see that a sufficient quantity is retained and is sealed or fastened up, so it is necessary to see that the way in which the sealing or fastening takes place shall be reasonably sufficient to allow of subsequent analysis by an analyst employed on behalf of the seller and by the public analyst. My difficulty has been as to whether the magistrate has dealt with this point and has found that the respondent has discharged the duty which I think was imposed upon him by the section. But, on consideration, I think that the magistrate must be taken to have so found. He has negatived the duty of the highest degree, namely, so to seal or fasten up the article as to ensure that at any time thereafter an analysis can be made. He says that that is not a condition precedent to the proceedings. He has not in terms found that the method employed was reasonably adequate and that reasonable care was taken, but I think that that apparent omission is supplied by the statement that the respondent contended that it was not proved that there was any negligence or want of care on his part. The magistrate's finding in paragraph 7 appears to mean that he found as a fact that there was no negligence on the part of the respondent and that the article was reasonably sealed or fastened

(1) [1906] 1 K. B. 398.

1914

WINTER-BOTTOM v. ALLWOOD.

up. He was therefore right in his view as to the meaning of the section and was clearly right on the facts in holding that the appellant committed the offence charged.

Appeal dismissed.

Solicitors for appellant: *T. D. Jones & Co., for J. & L. Clark, Smethwick.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for H. Brevitt, Wolverhampton.*

J. E. A.

COMMISSIONERS OF INLAND REVENUE *v.* ST. JOHN'S COLLEGE, OXFORD.

1915

Jan. 25.

Revenue (Reversion Duty)—Total Value of Land at Time of Original Grant of Lease—"Basis of rent reserved and payments made in consideration of lease"—Surrender of Lease and Payment of Fine upon Grant of New Lease—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 13, *sub-ss.* 1 *and* 2; *s.* 25, *sub-ss.* 1 *and* 3.

By s. 13, sub-s. 1, of the Finance (1909-10) Act, 1910, "On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this Part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty . . . ."

Sub-s. 2: "For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount (if any) by which the total value (as defined for the purpose of the general provisions of this Part of this Act relating to valuation) of the land at the time the lease determines, subject to the deduction of any part of the total value which is attributable to any works executed or expenditure of a capital nature incurred by the lessor during the term of the lease . . . . exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease . . . ."

Sect. 25, sub-s. 1: "The gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any . . . . charge . . . . might be expected to realise."

Sub-s. 3: "The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges . . . ."

Held, that for the purpose of ascertaining the "total value of the land at the time of the original grant of the lease" s. 13, sub-s. 2, and s. 25, sub-ss. 1 and 3, must be read together, but that in ascertaining in accordance with s. 25 how much the willing vendor might be expected

1915

INLAND REVENUE COMMISSIONERS v. ST. JOHN'S COLLEGE, OXFORD.

to obtain from the willing buyer regard must be had to the basis of the rent reserved and the payments made in consideration of the grant of the lease.

It was the practice of the respondents, without being bound by any covenant to do so, to grant a lease of a particular property for a term of forty years (being, subject to certain immaterial exceptions, the longest term for which they were empowered by law to grant a lease), and at the end of the first fourteen years of the term they accepted a surrender of the lease and in consideration of the surrender and the payment of a fine they granted a new lease for forty years, usually but not necessarily at the same rent as before.

In pursuance of this practice the respondents on October 15, 1884, granted to a lessee certain hereditaments for a term of forty years from October 10, 1882, in consideration of the surrender by the lessee of a prior lease and the payment of a fine. On December 8, 1896, the respondents in consideration of the surrender of the lease of 1884 and the payment of a fine of 95*l.* 8*s.* demised the hereditaments to the lessee for the term of forty years from October 10, 1896, at the yearly rent of 2*l.* 2*s.*, and similarly in 1910 in consideration of the surrender of the lease of December 8, 1896, and the payment of a fine of 95*l.* 8*s.* they granted a new lease of the hereditaments to the lessee for the term of forty years from October 10, 1910, at the yearly rent of 2*l.* 2*s.* The fine of 95*l.* 8*s.* was the approximate fine required to be paid as on December 8, 1896, by the lessee for the exchange of the unexpired term of twenty-six years into a lease for forty years or (in other words) for the renewal for forty years of the original lease of 1884 after the lapse of fourteen years. There was no dispute that the actual rateable value of the hereditaments was in fact the same at the dates of the commencement and determination of the lease of December 8, 1896:—

Held, (1.) that the surrender of the unexpired term of twenty-six years was not a "payment" within the meaning of s. 13, sub-s. 2, of the Act; (2.) that the "total value of the land" at the date of the grant of the lease of December 8, 1896, ought to be assessed on the basis of payments by the lessee to the respondents of the 2*l.* 2*s.* a year rent and the fine of 95*l.* 8*s.* for the exchange of the term of twenty-six years still unexpired in 1896 at that rent into a forty years term at the same rent.

PETITION by way of appeal on the part of the Commissioners of Inland Revenue against the decision of a referee appointed under the Finance (1909-10) Act, 1910, upon the appeal of the respondents, the president and scholars of St. John Baptist College in the University of Oxford, against an assessment to reversion duty which the Commissioners had made upon the respondents under the Finance (1909-10) Act, 1910, and the Revenue Act, 1911, in respect of certain freehold hereditaments known as 12, 13, and 14, Beaumont Buildings in the city of Oxford.

The respondents were and had for many years past been the freeholders of the hereditaments and were in relation to the lease thereof, which had determined (by surrender) as hereinafter appearing, the lessors for the purpose of s. 15 of the Finance (1909-10) Act, 1910 (1), and the persons to whom the benefit, if any, accrued from or by reason of the determination of the lease for the purpose of the other provisions of that Act relating to reversion duty.

By an indenture of lease dated December 8, 1896, and made between the respondents of the one part and William Eaglestone (thereinafter called "the lessee") of the other part, the respondents "in consideration of the sum of 95*l.* 8*s.* sterling paid to them by the lessee and for other good considerations" demised the above-mentioned hereditaments to the lessee for the term of forty years from October 10, 1896, at the yearly rent of 2*l.* 2*s.* and subject to the covenants and conditions therein contained.

In the year 1910 the respondents granted a new lease of the hereditaments to Eaglestone for the term of forty years from October 10, 1910, at a yearly rent of 2*l.* 2*s.* and subject to the covenants and conditions therein contained. The new lease was expressed to be in consideration of the surrender of a "former" lease of the hereditaments granted to the lessee and of the sum of 95*l.* 8*s.* sterling paid by him to the respondents. The "former" lease was in fact the lease of December 8, 1896, and the surrender thereof took place by operation of law upon the acceptance by the lessee of the new lease of 1910.

On January 27, 1912, the Commissioners gave notice in writing to the respondents that they had (as the fact was) under the provisions of the above-mentioned Acts made upon the respondents an assessment to reversion duty amounting to 20*l.* 3*s.* 11*d.* in respect of the benefit accruing to them by reason of the determination on October 10, 1910, of the lease of December 8, 1896.

The assessment was arrived at by the Commissioners as follows: They ascertained the total value (as defined for the

(1) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 15, sub-s. 1: 'Reversion duty shall be recoverable from any lessor to whom any benefit accrues from the determination of a lease . . . .'

1915

INLAND REVENUE COMMISSIONERS v. ST. JOHN'S COLLEGE, OXFORD.

purposes of the general provisions of Part I. of the Finance (1909-10) Act, 1910 (1)) as on October 10, 1910, of the hereditaments at 734*l.* and the total value of the hereditaments as at the time of the grant of the lease of December 8, 1896 (on the basis of the rent reserved by and payments made in consideration of the lease), at 168*l.* 13*s.* They accordingly ascertained the value of the benefit accruing to the respondents by reason of the determination of the lease at 565*l.* 7*s.* Duty at

(1) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 13, sub-s. 1: "On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this Part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value."

Sub-s. 2: "For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount (if any) by which the total value (as defined for the purpose of the general provisions of this Part of this Act relating to valuation) of the land at the time the lease determines, subject to the deduction of any part of the total value which is attributable to any works executed or expenditure of a capital nature incurred by the lessor during the term of the lease and of all compensation payable by such lessor at the determination of the lease, exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property) . . . ."

Sect. 25, sub-s. 1: "For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise."

Sub-s. 3: "The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and to any covenant or agreement restricting the use of the land entered into or made before the 30th day of April, 1909, and to any covenant or agreement restricting the use of the land entered into or made on or after that date, if, in the opinion of the Commissioners, the restraint imposed by the covenant or agreement so entered into or made on or after that date was when imposed desirable in the interests of the public, or in view of the character and surroundings of the neighbourhood, and the opinion of the Commissioners shall in this case be subject to an appeal to the referee, whose decision shall be final."

the rate of 1*l.* for every complete 10*l.* of the sum of 565*l.* 7*s.* amounted to 56*l.*, which being discounted as provided for by s. 3, sub-s. 2, of the Revenue Act, 1911 (1), gave a sum of 20*l.* 3*s.* 11*d.* as the net reversion duty for which the respondents were according to the claim of the Commissioners liable on the determination of the lease.

The respondents appealed to a referee against the assessment upon the ground (inter alia) that the "total value at the grant of the lease" was incorrect and had not been properly "calculated upon the basis" of the fine paid.

At the hearing before the referee it was agreed (inter alia) that the total value (as defined for the purposes of the general provisions of Part I. of the Finance (1909-10) Act, 1910) of the hereditaments on October 10, 1910 (the time at which the lease of December 8, 1896, was determined), was 734*l.*

It appears to be the practice of the respondents to deal with certain of their freehold properties as next hereinafter mentioned. They grant a lease of a particular property for a term of forty years (being subject to certain immaterial exceptions the longest term for which they are empowered by law to grant a lease), and at the end of the first fourteen years of the term they accept a surrender of the lease and in consideration of such surrender and the payment of a fine they grant a new lease for forty years, usually but not necessarily at the same rent as before.

In the present case it was proved at the hearing before the referee that the above had been the practice of the respondents

(1) Revenue Act, 1911 (1 Geo. 5, c. 2), s. 3, sub-s. 2: "Where, whether before or after the passing of this Act, a lease of any land determines on the vesting of the lessor's interest and the lessee's interest in the same person before the expiration of the term for which the lease was granted, the amount of the reversion duty (if any) payable shall not be the full duty, but such an amount as would, with compound interest at the rate of four per centum per annum for the residue of the term for which the lease was granted, produce the amount of the full duty. For the purposes of this provision the full duty means the duty (if any) which would have become payable if the lease had not determined until the expiration of the term for which it was granted, and, if the total value of the land were at that time the same, as it is when the lease actually determines."

1915

INLAND REVENUE COMMISSIONERS v. ST. JOHN'S COLLEGE, OXFORD.

in regard to the above-mentioned hereditaments and in particular that the lease of December 8, 1896 (upon the determination of which the claim for reversion duty arose), was granted in consideration of the surrender of a prior lease dated October 15, 1884 (by which the hereditaments had been demised for a term of forty years from October 10, 1882), as well as in consideration of the payment of a fine of 95*l.* 8*s.*; and that the lease of October 15, 1884, had itself similarly been granted in consideration of the surrender of a prior lease and the payment of 83*l.* 2*s.* 10*d.*

The practice, though often adopted by the respondents in common with other colleges in the Universities both of Oxford and Cambridge, was not uniformly so adopted even in the case of the same property and was in no sense obligatory. It had been adopted in the case of the above-mentioned hereditaments for a great number of years.

There was no dispute that the actual rateable value of the hereditaments was in fact the same at the dates of the commencement and determination of the lease of December 8, 1896.

The Commissioners in ascertaining the total value of the hereditaments at the time of the original grant of the lease of December 8, 1896, on the basis of the rent reserved and payments made in consideration thereof disregarded (as they claimed that they were entitled to do) the fact that part of the consideration for the grant of the lease was the surrender of the prior lease of October 15, 1884. They accordingly proceeded as follows: (*a*) They ascertained the capital value at thirty years' purchase of the yearly rent of 2*l.* 2*s.*, which is 63*l.* (*b*) They decapitalized the fine of 95*l.* 8*s.* on the basis of an annual payment (on the 6 per cent. tables) spread over the whole term of forty years which was granted by the lease of December 8, 1896. Such decapitalization works out as follows: 15*l.* being the present value (on the 6 per cent. tables) at 1*l.* per annum payable for forty years, 95*l.* 8*s.* is the present value (on the same tables) of an annual sum of 6*l.* 7*s.* 2*d.* payable for the same period. (*c*) Then they ascertained the capital value (on the 6 per cent. tables) of the annual sum of 6*l.* 7*s.* 2*d.* on the footing of it being an annual payment in perpetuity, which

capital value is 105*l.* 13*s.* The sum of 105*l.* 13*s.* being added to the sum of 63*l.* (the capital value of the yearly rent of 2*l.* 2*s.*) makes the total value of 168*l.* 13*s.*

The respondents on the other hand contended that for the purpose of ascertaining the total value of the hereditaments at the time of the original grant of the lease of December 8, 1896, on the basis of the rent reserved and payments made in consideration thereof a different method of calculation must be adopted. It was proved at the hearing before the referee that the fine of 95*l.* 8*s.* was computed upon the basis of an annual payment of a further rent of 47*l.* 14*s.* (which if added to the annual rent of 2*l.* 2*s.* would be the annual value to the respondents of the hereditaments on December 8, 1896, and also on October 10, 1910) for the term of fourteen years as from October 10, 1936, being the date at which the lease of December 8, 1896, would have expired by effluxion of time; and the Commissioners admitted that the sum of 95*l.* 8*s.* represented approximately the present value as on December 8, 1896, of an annual payment of 47*l.* 14*s.* for fourteen years deferred for twenty-six years.

The fine of 95*l.* 8*s.* was arrived at in the following way :—

The annual value of 49*l.* 16*s.* less 2*l.* 2*s.* rent gives a net improved value to the tenant of 47*l.* 14*s.* This according to Willick's Tables in the case of an original lease for forty years renewed after a lapse of fourteen years by the grant of a new lease for forty years requires the payment of a fine of 2·04 years' purchase of the net improved value to the tenant, i.e., two years' (say) purchase of 47*l.* 14*s.* or a fine of 95*l.* 8*s.*

The respondents therefore contended (inter alia) (1.) that the real annual value to them of the hereditaments on December 8, 1896, was 49*l.* 16*s.* (i.e., 47*l.* 14*s.* plus 2*l.* 2*s.*); (2.) that the total value at the grant of the lease of December 8, 1896, on the basis of the rent of 2*l.* 2*s.* and the fine of 95*l.* 8*s.* was accordingly, taking the 6 per cent. table for valuation, the capital value of the annual sum of 49*l.* 16*s.* in perpetuity, or 16⅔ years' purchase, i.e., 830*l.* If this contention of the respondents was correct, no reversion duty would be payable by the respondents.

The referee's decision was (so far as material to this report)

1915

INLAND REVENUE COMMISSIONERS v. ST. JOHN'S COLLEGE, OXFORD.

that no benefit had accrued to the lessor by reason of the determination of the lease.

The Commissioners appealed against the decision of the referee upon the grounds (inter alia)—

(1.) That upon the true construction of the Finance (1909-10) Act, 1910, and the Revenue Act, 1911, a benefit accrued to the respondents by reason of the determination of the lease of December 8, 1896, upon the value of which reversion duty became payable.

(2.) That upon the true construction of the Acts the method adopted by the Commissioners for the purpose of ascertaining the total value of the hereditaments at the time of the original grant of the lease of December 8, 1896, on the basis of the rent reserved and payments made in consideration of the lease was correct.

(3.) That upon the true construction of the Acts the method adopted by the respondents for the purpose of ascertaining the total value of the hereditaments at the time of the original grant of the lease of December 8, 1896, on the basis of the rent reserved and payments made in consideration of the lease was incorrect.

Sir S. O. Buckmaster, *S.-G.*, and *W. R. Sheldon*, for the appellants. The question is whether the word "payments" in s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910, includes an operation by way of surrender of a lease. When a lease of land ends reversion duty is to be exacted and measured upon the difference between the total value of the property at the end and the beginning of the lease. The latter value has to be deducted from the former, and if there is a surplus, that sum is assessable to duty. But the Legislature has most carefully defined the two meanings of "total value," i.e., at the beginning and at the end of the lease respectively, and they are two totally different and distinct conceptions. The total value at the end of the lease is the total value which is assigned to property for the purpose of valuation under the valuation sections for increment and other duty. That value is the price the property would fetch in open market if sold by a willing seller to a willing buyer. There is good

reason for that definition, because at the end of the lease property which is in hand is being dealt with, and its market value can be determined according to rules fixed by the condition of the market at the moment. But in order to determine the value at the beginning of the lease it is quite possible that it may be necessary to go back into a very remote and distant time. To determine the price a willing buyer would give in the open market and all other conditions say ninety-nine years ago would be extremely difficult, and the Legislature has expressly avoided any such difficulty by enacting that the total value at the beginning of a lease shall be estimated upon the basis of rent reserved and payments made. The basis of rent reserved is obviously arrived at by capitalizing on an agreed table of figures the capital value of the rent. The payments made can also be dealt with by reducing it to the form of a rent and capitalizing the rent into a capital figure. The rent reserved and the payments made are the only elements which are permitted to be taken into consideration in determining the total value of the land when the lease was granted. All other considerations are excluded by the statute. The reason is that it is essential, when dealing with value at a remote period, that figures should be based upon ascertained facts, and nothing can be ascertained so quickly and certainly as the payment of money and the reservation of rent.

The payment is of liquidated sums of cash. It is not the giving of advantage, nor conferring upon the lessor something which may have a money value. The first point is, therefore, whether "payments" includes the surrender of the lease which was existing on December 8, 1896.

Inland Revenue Commissioners v. *Marquess of Anglesey* (1) shows that the surrender of the lease on October 10, 1910, cannot be considered as an element in determining the total value of the land when the lease ended.

The Finance (1909-10) Act, 1910, lays down arbitrary definitions as to what are called "values," and those definitions must be followed exactly, because it is on that that the taxation proceeds. And if in such a case as the present one the Legis-

(1) [1913] 3 K. B. 62.

1915

INLAND REVENUE COMMISSIONERS v. ST. JOHN'S COLLEGE, OXFORD.

lature, moved by a desire to obtain the largest possible sum upon which taxation could be levied when the lease ends, has taken care so to limit the "value" of the property when the lease was granted that the person who owned it can bring in nothing excepting capitalized rent and premium, the Court is bound by that legislation.

The total value of the land when the lease begins as defined by s. 13, sub-s. 2, is in itself just as artificial a value as the total value when the lease ends defined by s. 25. The meaning of "on the basis of" in s. 13, sub-s. 2, is that the rent is to be capitalized.

Sect. 25 has nothing to do with the total value of land at the beginning of the lease. The definitions of total value at the beginning and end of the lease cannot be associated in any way. The total value at the end is determined by existing facts, that at the beginning only by taking the material upon which the calculation can rest, namely, liquidated sums of money. That is made plainer by the words in brackets "including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect any buildings or to expend any sums upon the property." In that case only is the value of a covenant to be determined.

In *Commissioners of Inland Revenue* v. *Marquess Camden* (1) it was decided that a payment made in consideration of the lease must be taken into consideration although not made to the lessor. In that case Lord Shaw of Dunfermline said in the House of Lords that "It is recognized by the statute that there may be difficulties in going back to the time of the original grant. The difficulties are of this nature, that it might be impossible to tender any kind of satisfactory proof as to original value apart from these two considerations, namely the rent reserved and payments made in consideration of the lease."

That passage shows that if the value of the term of twenty-six years surrendered in 1896 is considered, the one thing Lord Shaw said the statute regarded as undesirable, namely, speculation as to the value of property at a far distant and antecedent time, would take place. It would make no difference whether it was

(1) [1914] 1 K. B. 641; [1915] A. C. 241.

twenty-six years or ninety-nine years ago. Lord Shaw says that the Legislature has considered how extremely difficult such a thing would be and that that is not to take place. If rent and payment were introduced for the purpose of avoiding speculation as to the former value of property it was intended to avoid among other things speculation as to the value of unexpired terms. Total value at the beginning of the lease is excluded from s. 25 for the reason that the conditions, namely, the open market, the willing seller, and the condition in which the property stood when the lease began, cannot be fixed. But the respondents contend that they are to be fixed for the purpose of determining, not the value of the fee simple which is more readily capable of determination, but the value of an unexpired term of twenty-six years in this property in 1896, upon the hypothesis that two guineas rent ran for the remaining twenty-six years, and 95*l.* 8*s.* had been paid as premium fourteen years before. To embark on such a calculation of market value would be merely to guess, and although it is true that in the present case it would only be necessary to go back fourteen years, if the principle were upheld it might be necessary to go back any distance of time.

Every difficulty which exists in arriving at the value of a fee simple at the time of the grant of a lease is immeasurably multiplied when an unexpired term of years at a rent in the property has to be considered. In ascertaining the total value in 1896 no question of willing seller and willing buyer comes in. The fresh lease is granted every fourteen years not by virtue of an antecedent obligation. There is no covenant that it shall be done, although it is true that this lease was granted in 1896 in pursuance of a long course of practice which had grown up in the college. The word "payments" in s. 13, sub-s. 10, of the Act of 1910 means payments in cash or at any rate a liquidated sum which could be sued for under a specially indorsed writ. If not, there will be introduced a valuation at the commencement of the lease in 1896 which the section expressly intends to exclude.

Cave, K.C., and *J. E. Harman*, for the respondents. The respondents, when fourteen years of any lease they have granted run out, give the tenant an opportunity of renewing his lease for forty years from that date, but on the terms of paying full

1915

INLAND REVENUE COMMISSIONERS v. ST. JOHN'S COLLEGE, OXFORD.

consideration for the benefit he obtains by the renewal. The term of forty years is not a present to the tenant, because he pays a sum which is full consideration for the exchange then made between the two leases. Therefore it is an ordinary business transaction. The money that he pays represents the difference between the value of the lease for twenty-six years and the value of the lease for forty years. The respondents desire to keep open, though it cannot be relied upon in this Court, the point that there is no real benefit accruing to the college by the determination of the lease of 1896. Its income remains exactly the same, and although it obtains 95*l.* 8*s.* it pays for that by giving a longer lease. In *Ramsden* v. *Inland Revenue Commissioners* (1) Horridge J. must be taken to have held that the question whether there is real benefit cannot be taken into consideration. The statute alone must therefore be considered. Sect. 14, sub-s. 3, of the Act of 1910, which dealt with the case of surrender and renewal, has been repealed as from the date of its being enacted by s. 3, sub-s. 5, of the Revenue Act, 1911. The Act of 1911 is not in point, and the present case turns upon the true construction of s. 13 of the Finance (1909-10) Act, 1910. The total value when the lease of 1896 determined by surrender in 1910 is the total value as explained in s. 25. That total value in this case is the market value. Then the total value at the beginning of the lease of 1896 has to be ascertained. That total value has to be ascertained as defined by s. 25 of the Act of 1910. The means for arriving at that total value may be limited by s. 13, but still the total value, that is the market value, of the property has to be sought. The total value to be sought is the market value in 1896, although the facts which may be taken into account are limited. In view of the time which has elapsed between the grant of the lease and its determination the Legislature has said in effect "We will give you a guide and you are to ascertain the total value in 1896 on the basis of rent reserved and payments made." The first point is, what is the meaning of "on the basis of"? Basis means foundation, and s. 13, sub-s. 2, means that in the calculation regard is to be had to the rent reserved and payments made when the lease was granted. It

(1) [1913] 3 K. B. 580.

does not mean that the rent reserved and payments actually made are to be deemed the total value. Regard must be had to what the payment was made for. It is not to be assumed that the 95*l.* 8*s.* was simply a fine paid for the grant of a lease of forty years, there being no other matter under consideration; regard is to be had to the fact that the grantee of the new lease not only paid the 95*l.* 8*s.*, but gave up a valuable lease of twenty-six years which he had. The surrender of the lease of twenty-six years was one of the considerations for the new lease. The lease of 1896 itself states that it was granted for the 95*l.* 8*s.* and other good considerations. From those facts the total value in 1896 has to be found in accordance with the definition contained in s. 25.

Ninety-five pounds eight shillings is the consideration for the last fourteen years of the new lease, or it may be said to be the consideration for the respondents taking the surrender of the old lease and granting a new lease for a longer time. Upon that basis the annual value of the land in 1896 can be ascertained, and from that the total value. There is nothing in s. 13 to compel the Court to draw the inference (contrary to the fact) that the fine was spread over the whole forty years. The language of s. 13 is not merely "payment" but "on the basis of." But further the word "payment" is used in the broader sense and includes the surrender of an existing lease—in the present case the lease of 1884. Payment is used in the narrow sense of a money payment in some cases, but payment may also be taken in kind, and the point as to the meaning of "payments" in s. 13 was left open in *Ramsden's Case* (1), Horridge J. saying that he would not decide it because the decision was not necessary in that case.

Maillard v. *Duke of Argyle* (2) shows that the word can be used in a popular sense as including the giving of a bill. *Turney* v. *Dodwell* (3) shows that there may be a payment within the Statute of Limitations by delivery of a bill of exchange. The words "including . . . . the value of any covenant" between the brackets in s. 13, sub-s. 2, of the Act of 1910

(1) [1913] 3 K. B. 580. (2) (1843) 6 Man. & G. 40.
(3) (1854) 3 E. & B. 136.

1915

INLAND REVENUE COMMISSIONERS v. ST. JOHN'S COLLEGE, OXFORD.

show that "payment" is used in the wide popular sense so that it can be extended even to a covenant to build. The *Camden Case* (1) shows that the word "payment" may be taken as including the value to the lessor of expenditure. That is using "payment" in a very popular sense. It is not an exact sum of money disbursed, but it is taking the value of the disbursement and applying the word "payment" in the popular sense of consideration, or benefit or property passing. In the present case the parties were both willing one to renew and the other to have the lease renewed.

The state of the money market would not alter the number of years' purchase, but only the quantum of the annual value itself. Ninety-five pounds eight shillings was not the fine for the forty years, but was the consideration for the exchange of the lease of forty years for the lease of twenty-six years. Under s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), repealed by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), it was held in *Spargo's Case* (2) that there might be payment within the meaning of that section otherwise than in cash, and that "any bona fide transaction between a company and a shareholder which, if the company brought an action against him for calls, would support a plea of payment" would be sufficient to satisfy the words of the section "subject to the payment of the whole amount thereof in cash." The words "total value" in the latter part of s. 13, sub-s. 2, of the Act of 1910 must have some meaning. The expression "total value" is never used in either a popular or any other sense in reference to property in a house, and there is nothing it can refer to except the definition in s. 25.

The words "total value" are used in sub-s. 2 of s. 13 within four lines of each other, and it is impossible to contend with success that the expression "total value" in those two places does not refer to the same thing. It is admitted by the appellants that "total value" in the first place refers to s. 25. The words "total value" have no popular meaning and they can only refer to s. 25. The result is that the total value has to be ascertained a second time for the purposes of s. 25, but it has to be ascer-

(1) [1914] 1 K. B. 641; [1915] A. C. 241. (2) (1873) L. R. 8 Ch. 407.

tained " on the basis of " the rents reserved and payments made. That is not a matter of speculation. The " total value " has to be " ascertained " on the basis of certain facts, i.e., the facts must be considered in order to arrive at the meaning of the figures in the case. In the present case the payment of 95*l.* 8*s.* represented an annual value of 47*l.* 14*s.* It is speculation to do what the appellants suggest ought to be done, namely, that the fine should be decapitalized and then capitalized again and spread over the whole forty years. That is not looking at the true facts and taking the fine intelligently. The fine either represented fourteen years deferred for twenty-six years or, putting the same thing in other words, the difference in the exchange of the forty years and the twenty-six years. The new lease is granted at a moment of time when the estate of the lessor comes into possession for a moment by the surrender in law of the old lease, and the true effect of it is that for a moment the landlord has an estate in possession and he grants a new lease for forty years. What is paid for is the exchange value between the two leases. If the Court can produce a result which is in consonance with reason and with justice it will do so. It being admitted that the annual value was the same in 1896 as in 1910, it hardly seems consistent with common sense to arrive at the result of 168*l.* as being the total value at the beginning and 734*l.* at the end of the lease of 1896, and there is nothing in the statute which compels the Court to arrive at that result.

Sir S. O. Buckmaster, S.-G., in reply. The contention on behalf of the respondents is in effect that the 95*l.* 8*s.* must be considered not upon the basis of the payment of a premium nor in relation to the rent, but as associated with the payment created by the surrender of the lease. That contention is fallacious. The premium must be reduced to an annual payment for the period of years for which the lease which is granted runs. The annual rent must then be added, and by that method a basis of rent is obtained which has to be capitalized into capital value. The payment is for a term of years. But if the term of years were granted on payment of a premium and the grant of an easement, the grant of the easement could not be brought into consideration. The payment of the money distributed over the

1915

INLAND REVENUE COMMISSIONERS v. ST. JOHN'S COLLEGE, OXFORD.

term of years could alone be considered, and though that would produce a rent less than the proper rent of the property by reason of the fact that the most valuable part of the consideration, namely, the grant of the easement, might have been ignored, nevertheless that would be the proper way to make the calculation, because the grant of the easement or the entering into an obligation are matters which are excluded by the statute. And one class of benefit cannot be taken into consideration any more than another. It would be quite logical to say that payment means benefit conferred, but it is not what the statute means. The words "on the basis of" have nothing with which they are connected except the "payment." The payment cannot be taken as associated with any other transaction. The words are not "the consideration given for the lease." The word "payment" means payment only and does not include benefit conferred. The surrender of a term of years cannot in this respect be distinguished from the grant of an easement or a right to take a profit à prendre, the entering into a restrictive valuable covenant, or any of the other considerations that might move the lessor to grant a lease. None of those matters are to be considered under the statute, the reason being that no one can say that the grant of any of these rights or privileges, though they are valuable and can be converted into money and might even have a market value, can be in any way a "payment" made in consideration of the lease.

ROWLATT J. The question arises in this case as to the proper way of calculating the amount upon which reversion duty is payable. That duty is by s. 13 of the Finance (1909-10) Act, 1910, charged upon the benefit accruing to the lessor by reason of the determination of the lease, and that indicates taxation of the character I am about to mention. During the existence of the term the property leased is not at the disposal of the lessor. When the lease falls in it becomes at the lessor's disposal and the taxation is directed towards the benefit which accrues to him in so far as that represents a difference between two values which have to be ascertained one at the commencement of the lease and the other at its termination.

On behalf of the respondents Mr. Cave has indicated, for the purpose of keeping the point open, that in this case, inasmuch as the lease only determined upon the terms that the property was at once granted away again, no benefit has in fact accrued to the lessor. He mentions that point, which I understand he does not suggest he can raise before this Court, in order that it may be available to him hereafter, and I therefore mention it and pass from it.

As to the total value mentioned in s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910, at the time the lease of 1896 determined, no question arises before me in this appeal. The only question is what is the amount to be taken as the total value of the land at the time of the original grant of the lease of 1896.

The words of s. 13, sub-s. 2, upon that question are "the total value of the land at the time of the original grant of the lease." Those words coupled with the preceding words of the sub-section "the total value (as defined for the purpose of the general provisions of this Part of this Act relating to valuation) of the land at the time the lease determines" indicate that the comparison is to be made between the total value as defined in the Act and the total value (which upon the words of s. 13, sub-s. 2, so far, I should read as being the same total value) at the commencement of the lease. The words "total value" have no meaning at all except by virtue of the definition in the Finance (1909-10) Act, 1910, and I do not think I can, in construing the statute, read the word "total" as being brought in completely per incuriam. I am therefore driven to s. 25, which defines "total value," in order to discover the two sums between which the comparison is to be instituted. It is obvious that I am driven to do that if the taxation is really upon the increase of value in the property which has taken place. But although I am driven to s. 25, I am directed to observe a certain limitation, namely, that the total value is "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease." It is upon the meaning of that direction that this question arises.

I do not think that there is any difficulty in reading the words

1915

INLAND REVENUE COMMISSIONERS v. ST. JOHN'S COLLEGE, OXFORD.

Rowlatt J.

of s. 13, sub-s. 2, to which I have just referred and the words of s. 25 together. I do not think that the fact that those words can be read together in the least displaces the Solicitor-General's argument, although I apprehend that at first he launched his case as if one had not to go to s. 25 at all. In my judgment what one has to do is this: s. 25 must be looked at in order to see what is the gross value of the land upon the assumption that it is arrived at by chaffering in the market between a willing seller and a willing buyer, and there must be deducted any amount required to represent public rights of way and the other deductions allowed by sub-s. 3 of s. 25. But in ascertaining what is the gross value—what the willing vendor would obtain from the willing buyer—the basis of the rent reserved and the payments made in consideration of the lease must be regarded. In my view that is what sub-s. 2 of s. 13 means.

The next question is, how am I to apply these words "to be ascertained on the basis of the rent reserved and payments made"? The Solicitor-General contends that the respondents ask me to say that the surrender of a lease is a payment. In my judgment that is an unarguable proposition. The surrender of a lease is not a payment.

But that is very far from concluding this case. I have to ascertain this value on the basis of the rent reserved and payments made, and the question is what is the meaning of "on the basis of"? If a payment, e.g. a fine, is made when the lease is granted, it is not suggested that I am simply to take that lump sum and add it on to the value of the rent reserved under the lease; that would be an absurdity. I have to take the payment made—frequently called a fine—with reference to what it is paid for. If the property is in hand and a new lease is granted (the case which most frequently occurs) I have to consider the length of the term granted, and the payment made only affords a basis upon which any desired calculation can be made if the payment is taken with reference to the number of years at a certain rent which the payment buys. The question is how that method is to be applied in the present case where a payment was made in consideration of the exchange of a leasehold interest with twenty-six years to run for a lease with forty years to run. It is

contended by the appellants that I must simply take that payment as applicable to the forty years and divide it up. But that is not looking at the substance of the transaction, and I do not think that it is assessing the total value upon the basis of the payment made. The payment was not made in fact for forty years; it was made for fourteen years, deferred to the end of twenty-six years from date; and when that transaction is looked at and the question what light the payment throws upon the value of the property is considered (which is what has to be done if the value is assessed upon the basis of a payment) the only light which the payment throws upon the value of the property—the only basis which it affords, if I may say so, for calculating anything—is the information which it gives as to how much would be paid for the extension of a twenty-six years' interest into a forty years' interest, which is the same thing as a leasehold interest for fourteen years at the expiration of twenty-six years.

Therefore the 95*l.* 8*s.* must be split up in that way and not simply reduced to an annual sum on the footing that the property was in hand when the new lease was granted; and according to the calculation which has been made the 95*l.* 8*s.* represents two years' annual value having regard to the exchange in the two leasehold terms which are affected by the transaction. The proper figure payable was two years' annual value, and that is 95*l.* 8*s.*; therefore, if the total value is to be assessed on the basis of the rent reserved and payments made, what has to be done is to assess it on the basis of two guineas a year rent and a payment of 95*l.* 8*s.* for the exchange of the twenty-six years' term at that rent into a forty years' term at the same rent, and on that footing I understand the referee has decided in favour of the respondents. When the real relation of the payment of the fine to the transaction is appreciated it becomes clear that the only basis which the payment of 95*l.* 8*s.* affords at all is that which I have indicated.

Of course the argument based upon the supposed general scope of the statute is open to the respondents. It is perfectly clear that in point of sound economic arithmetic they are right if the comparison is to be for the purpose of ascertaining the increase of value of the land in the meantime. But I wish

1915

INLAND REVENUE COMMISSIONERS v. ST. JOHN'S COLLEGE, OXFORD.

Rowlatt J.

to say I am not in the least influenced by that consideration. It seems to me I have to look at the words of the statute and apply them perfectly strictly, but so as to make them operate in a sensible way by reading "payment" with regard to that for which the payment is made, and not by taking the payment as being made for the same thing in the case of an immediate term granted, and in the case of a deferred term granted upon the surrender of an existing lease.

I am therefore of opinion that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Fladgate & Co.*

J. E. A.

C. A.

1915

March 16.

[IN THE COURT OF APPEAL.]

MEADE-KING, ROBINSON & CO. *v.* JACOBS & CO. AND OTHERS.

[1912 M. 2022.]

[1912 M. 2771.]

Ship—Charterparty — Hire for Fixed Period—Provision for Cessation of Payment of Hire—"Loss of time through damage preventing efficient working of vessel for more than forty-eight running hours"—Loss of Time exceeding forty-eight Hours—Cessation of Payment for first forty-eight Hours.

A charterparty of a steamer for three years and nine months, under which the hire was payable monthly in advance, provided that "in the event of loss of time through deficiency of men or stores, repairs . . . . or damage preventing the efficient working of the vessel for more than forty-eight running hours the payment of hire shall cease until she be again in an efficient state to resume her service":—

Held, that, in the event of loss of time for a period exceeding forty-eight running hours through any of the specified causes, payment of hire ceased for the whole period, including the first forty-eight hours.

Decision of Bailhache J. [1914] 3 K. B. 156 affirmed.

APPEAL from a decision of Bailhache J. (1)

By a charterparty dated August 29, 1910, the plaintiffs hired

(1) [1914] 3 K. B. 156.

the steamer *Batoum* for a period of three years and nine months from the date of the charterparty to carry all lawful merchandise in any part of the world except Baltic and White Sea ports between October 1 and April 1 and all ports in British North America. The sum payable for hire was 1722*l.* per calendar month and after the same rate for any part of a month, to be paid in cash monthly in advance.

Clause 25 of the charterparty was as follows: "In the event of loss of time through deficiency of men or stores, repairs, breakdown of machinery, pumps, pipes, or boilers (whether partial or otherwise), collision or stranding, or damage preventing the efficient working of the vessel for more than forty-eight running hours, the payment of hire shall cease until she be again in an efficient state to resume her service; and should the vessel, from any of the afore-mentioned causes, put into any other ports than those to which she is bound under the instructions of the charterers, the port charges, pilotages, and other expenses at those ports, loss of time consequent upon putting in shall be borne by the owners, also should the steamer put back while on voyage, by reason of any accident, the hire shall be suspended from the time of her putting back until she be again in the same position, and the voyage resumed therefrom; but should the vessel be driven into port or to anchorage by stress of weather such detention or loss of time shall be at the charterers' risk and expense. In the event of the nation to which this vessel belongs becoming engaged in hostilities the hire to cease during the continuance of such hostilities, if the charterers find it impossible to employ the steamer in consequence. It is agreed that all detention or loss of time provided for in this clause and not paid for shall not count as part of the guaranteed time specified under this charter. All graving dock charges to be at owners' expense."

The steamer lost time, owing to some of the causes specified in clause 25 preventing her efficient working, for a period much longer than forty-eight running hours. The plaintiffs contended that in that case the time during which the payment of hire ceased under the above clause was the whole period, including the first forty-eight hours; the defendants contended that the first forty-eight hours ought to be excluded in computing the time

C. A. 1915

MEADE-KING, ROBINSON & Co. v. JACOBS & Co.

during which the payment of hire ceased. There were other claims in the action, but the parties during the hearing came to an agreement upon all matters in dispute except the above question.

Bailhache J. held that payment of hire ceased for the whole period, including the first forty-eight hours.

The defendants appealed.

Adair Roche, K.C., and *Raeburn*, for the defendants.

Greer, K.C., and *F. D. Mackinnon*, K.C., for the plaintiffs, were not called upon to argue.

BUCKLEY L.J. The order under appeal, I think, is right. The question is the shortest possible question of construction of a few words in clause 25 of the charterparty. I shall give three reasons, but the most convincing reason is, I think, the one suggested by Pickford L.J. during the argument. That is this: that the clause is to be read thus: in the event of loss of time through certain things preventing the efficient working of the vessel for forty-eight hours or less the payment of hire shall not cease, but in the event of loss of time through certain things preventing the efficient working of the vessel for more than forty-eight hours the payment of hire shall cease. In the former of these two alternatives the words must speak as from the moment when the vessel ceased to be efficient. Why should they not speak in the same way when the latter portion of the alternative applies?

The second reason I assign is this. I think the clause has to be read as if you put into brackets the words beginning "through deficiency of men" down to "forty-eight running hours"; and then the clause would run thus: "In the event of loss of time the payment of hire shall cease." That is to be qualified by adding "if the loss of time is attributable to certain causes." Amongst those comes in the provision that the efficient working must be prevented for more than forty-eight running hours.

The third reason is this. I think there is considerable light to be obtained from the words "until she be again in an efficient state to resume her service." The word "until" predicates a period of time having a terminus a quo and a terminus ad

quem—from a time to a time; and the "again" conveys the idea that she is to be found at the end of that time in the position in which she was at the beginning of that time. So that the words "until she be again in an efficient state" call attention to a period of time commencing with the moment at which she ceased to be and ending at the time when she again became in an efficient state, and it is that period of time which seems to me to be regarded as that for which the payment of hire shall cease. The whole question to be determined is this: supposing that the vessel has been by the causes here mentioned prevented from efficiently working for, say, fifty hours, is the loss of time to be taken to be the two hours, namely, fifty less forty-eight, or is it to be taken to be fifty hours, the whole time? The learned judge thought it was the latter, and in that I think he was right. I think the clause is that the whole loss of time is to be paid for, that is to say, the whole of the hire ceases during the whole period of time provided that the contingency which is mentioned in the clause has been satisfied; that is to say, that through the causes mentioned the efficient working of the vessel for more than forty-eight hours has been prevented.

For these reasons the appeal fails.

PICKFORD L.J. I am of the same opinion, and I do not think it necessary to add anything.

BANKES L.J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendants: *William A. Crump & Son.*

W. J. B.

1915
April 13, 14, 22.

PADDINGTON UNION *v.* WESTMINSTER UNION.

Poor Law—Settlement by Residence—Irremovability—Child having "no other settlement" than that of Parent—Poor Removal Act, 1848 (11 & 12 *Vict.* c. 111), *s.* 1.

By s. 1 of the Poor Removal Act, 1848, it is provided that "Whenever any person should (1) have a wife or children having no other settlement than his or her own such wife or children should (1) be removable from any parish or place from which he or she would be removable":—

Held, that the words "other settlement" than that of the husband or parents meant "settlement in a different parish" from that of the husband or parents, and did not include a settlement independently acquired by a child in the parish in which his parents were settled.

Case stated under 12 & 13 Vict. c. 45 on appeal from an order of removal.

On April 28, 1914, an order of justices was made for the removal of Henry Gardner from the Westminster Union to the parish of Paddington as being the place of his last legal settlement.

Henry Gardner was the lawful son of Henry Stephen and Ellen Gardner, and was born on October 29, 1898, in the parish of Paddington. He resided with his parents in the parish of Paddington from the time of his birth to July, 1904, and he and his father respectively by virtue of such residence acquired settlements in that parish under the provisions of s. 34 of 39 & 40 Vict. c. 61. On November 21, 1904, Henry Gardner was placed by his father in the care of the Crusade of Rescue Society, and on November 22, 1904, the society sent him to their home known as the St. Joseph's Home, in the parish of Enfield in the Edmonton Union, and he resided there till June 16, 1911. From June 16, 1911, until March 31, 1913, Henry Gardner resided in various other institutions. On November 6, 1907, Henry Stephen Gardner, the father, died. From November 22, 1904, until his death he had resided outside the Edmonton Union and would have been "removable" (within the meaning of s. 1 of the Poor

(1) *Sic*, apparently by inadvertent copying of the indirect form rightly used in the preamble.

Removal Act, 1848) from the said union. Since November 22, 1904, Ellen Gardner, the mother, had always been resident outside that union and would have been removable from it within the meaning of the said section. Ellen Gardner was last legally settled in the parish of Paddington by virtue of the aforesaid residence of her husband in that parish. On March 31, 1913, Henry Gardner became chargeable to the Westminster Union, whereupon the above mentioned order of removal was obtained by the guardians of the Westminster Union. The guardians of the Paddington Union appealed to the quarter sessions for the county of London, and the above case was stated by the consent of the parties.

The appellants contended that the pauper Henry Gardner acquired a settlement in the parish of Enfield by virtue of the provisions of s. 34 of 39 & 40 Vict. c. 61.

The respondents contended that he was precluded from acquiring a settlement by residence in that parish by reason of the provisions of s. 1 of the Poor Removal Act, 1848.

The question for the opinion of the Court was whether he was on the facts above stated precluded from acquiring a settlement by residence in the parish of Enfield by reason of the provisions of the last mentioned section.

Macmorran, K.C., and *Sydney Davey*, for the appellants. By s. 1 of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66) (as amended by 28 & 29 Vict. c. 79, s. 8), it is provided that "No person shall be removed . . . . from any parish in which such person shall have resided for" one year "next before the application for the warrant." But that enactment was subject to a proviso, which as amended by 11 & 12 Vict. c. 111 is to the effect that "Whenever any person should have a wife or children having no other settlement than his or her own such wife and children should be removable from any parish or place from which he or she would be removable notwithstanding any provisions of the said recited Act, and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act." It is not disputed by the respondents that the pauper resided in the parish of Enfield

1915

PADDINGTON UNION v. WEST-MINSTER UNION.

for upwards of three years in such manner and under such circumstances in each of such years as to confer the status of irremovability, and consequently acquired a settlement in that parish, unless he came within the proviso and was consequently removable from that parish by reason of the fact that his parents would have been removable therefrom. It is contended by the appellants that he did not come within that proviso, because he was not a child "having no other settlement" than that of his parents. Since the decision of the House of Lords in *Hackney Union* v. *Kingston-upon-Hull* (1) it is settled law that a legitimate child though under sixteen and though living with his parents can acquire a settlement for himself by residence. Moreover the case here finds that by his residence in Paddington from 1898 to 1904 the pauper had acquired independently of his father a settlement by residence in that union. The words "no other settlement than his or her own" mean no other settlement than one derived from the parent. This was the view taken in *Mitford Union* v. *Wayland Union.* (2) Dealing there with the proviso in question Lord Esher said: "What is the meaning of the following words, 'having no other settlement than his or her own'? In order to construe those words we must look at the different persons to whom they are applied. Who are they? 'Wife or children' and no other—wife or children still being part of the father's or mother's family. That being so I have no hesitation in saying that the meaning of the words 'having no other settlement than his or her own' is 'having no other settlement than the settlement derived from him or her'"; and Lopes L.J. also said that he understood the words of the proviso to mean "having no other settlement than a derivative settlement."

Rawlinson, K.C., and *Herbert Davey*, for the respondents. There are three cases in the House of Lords—*West Ham Union* v. *Holbeach Union* (3), *Fulham Parish* v. *Woolwich Union* (4), and *Hackney Union* v. *Kingston-upon-Hull* (1)—which decide that a child under sixteen can acquire a settlement by residence while living with its parent, the first two cases dealing with an illegitimate child, the third with a legitimate child. But those

(1) [1912] A. C. 475.
(2) (1890) 25 Q. B. D. 164.
(3) [1905] A. C. 450.
(4) [1907] A. C. 255.

cases do not decide that the settlement so acquired by the child is a settlement "other than" that of the parent. The word "other" in the proviso in s. 1 of 11 & 12 Vict. c. 111 means in a different place. The appellants seek to read into the proviso words which are not there. If their contention were right every "children's home" maintained by voluntary contributions would be a nuisance to the ratepayers, for the children in it would acquire settlements in the parish, though their parents might live in a different part of the country. The sole authority for the appellants' contention is to be found in the dicta of Lord Esher and Lopes L.J. in *Mitford Union* v. *Wayland Union* (1), but those dicta were only obiter, for if the words of the proviso had there been read as meaning "having no settlement different from his or her own" the decision would have been just the same. The judges there never suggested that a child could be irremovable from a parish from which his father was removable. The removability of a child is always governed by that of his father. The proviso applies notwithstanding that the separation of the family is not in question by reason of the parent and child living in different unions at the time of the child's residence in the parish in which the settlement is claimed: *West Ham Union* v. *St. Matthew, Bethnal Green.* (2) Here the pauper did not acquire a settlement in Enfield because during the whole period of his residence there he was removable.

Macmorran, K.C., in reply.

Cur. adv. vult.

April 22. LORD READING C.J. read the following judgment:— The pauper Henry Gardner, born in 1898 in the parish of Paddington, is the lawful son of parents who resided in that parish from the date of the pauper's birth until July, 1904. By virtue of the provisions of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34, both the parents and the son acquired settlements respectively in that parish. From November, 1904, till June, 1911, the pauper resided in the parish of Enfield in the Edmonton Union. Neither the father nor the mother was ever resident within the parish of

(1) 25 Q. B. D. 164. (2) [1894] A. C. 230.

1915

PADDINGTON UNION v. WEST-MINSTER UNION.

Lord Reading C.J.

Enfield. The father died in 1907, but his death does not affect the matter under consideration. During his life he was removable and his wife was at all times removable from the union of Edmonton. In March, 1913, the son became chargeable to the City of Westminster Union. In April, 1914, on the application of the respondents an order was made by the justices adjudging the son to be settled in the parish of Paddington. The appellants contend that the order is wrongly made on the ground that the son had acquired a settlement in the parish of Enfield by virtue of s. 34 of the Divided Parishes Act, 1876. The respondents' contention is that the pauper was precluded from acquiring a settlement by residence in Enfield by reason of the Poor Removal Act, 1848, s. 1.

The question to be decided is whether the pauper had acquired a settlement in the parish of Enfield at the time the order of the justices was made. There is no doubt that the pauper had acquired a settlement in the Paddington Union because he had resided there from the date of his birth until 1904 with his parents, who were irremovable during this period.

The question is whether the son was irremovable during his residence at Enfield and had thus acquired a settlement in that parish. If so, he no longer had a settlement at Paddington and the order of the justices is wrong. If not, he had never lost his settlement at Paddington as he had acquired no other, and the order is right. The answer depends upon the true interpretation of the 1st section of the Poor Removal Act, 1848 (11 & 12 Vict. c. 111), which amends the proviso at the end of the 1st section of 9 & 10 Vict. c. 66. Has he retained his settlement at Paddington because, never having been irremovable during his residence at Enfield, he never acquired a settlement there? The words of the Act of 1848 are: "Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife or children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act, and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act." Therefore if the proviso

applies to this case he was always removable from Enfield because his parents were always respectively removable. It is contended by the appellants that the words of the proviso "having no other settlement than his or her own" mean provided the pauper has no other settlement than the settlement derived from the father or mother, and that consequently, as the son's settlement at Paddington was an independent settlement and not a derivative settlement, this statute has no application. This construction of the language of the statute is supported by the dicta of Lord Esher and Lopes L.J. in the case of *Mitford Union* v. *Wayland Union*. (1) These dicta have the effect of limiting the natural meaning of the words by introducing words into the statute which are not there, and in my view should not be followed by this Court. The observations relied upon were mere dicta, and moreover the decision of the Court of Appeal was overruled by the decisions of the House of Lords in *West Ham Union* v. *Holbeach Union* (2) and *Fulham Parish* v. *Woolwich Union* (3) and *Hackney Union* v. *Kingston-upon-Hull* (4), that an infant may acquire an independent settlement. When Lord Esher and Lopes L.J. made the remarks in question they assumed the law to be that a child could only acquire a derivative and could not acquire an independent settlement, and consequently they read into the section words which in their view did not in any sense restrict the operation of the statute. The moment it is clear that a child can acquire an independent as well as a derivative settlement it appears to me that the words of the section in their natural and ordinary meaning cannot be limited to derivative settlements but must also apply to independent settlements. The words "having no other settlement than his or her own" are plain, and in my judgment mean having no settlement different from that of the father or mother. This construction is in accordance with the policy of the Legislature which was to discourage the separation of children from their parents. That would not be a reason for arriving at an interpretation other than that properly attributable to the plain words of the section, but it is a satisfaction to find

(1) 25 Q. B. D. 164, at pp. 170 and 175.
(2) [1905] A. C. 450.
(3) [1907] A. C. 255.
(4) [1912] A. C. 475.

1915

PADDINGTON UNION v. WEST-MINSTER UNION.

Lord Reading C.J.

that this construction of the words will be more in accordance with this policy than the aforementioned limited interpretation. The son never had a settlement different from that of his parents; he had a settlement in Paddington, as had also his parents. The latter were always removable from Enfield, and, therefore, by virtue of the statute he also was always removable from Enfield. The result is that he never ceased to have a settlement at Paddington, and the order of the justices is right and must be affirmed.

AVORY J. read the following judgment:—The question to be determined in this case is whether the pauper acquired a settlement in the parish of Enfield in the Edmonton Union by virtue of the provisions of s. 34 of 39 & 40 Vict. c. 61—that is to say whether the pauper resided for the term of three years in that parish "in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable." The respondents admit that the pauper resided for the requisite term of three years and more in the parish of Enfield, and that by the decision of the House of Lords in *Hackney Union* v. *Kingston-upon-Hull* (1) he would by such residence, though under sixteen years of age, have acquired a settlement therein if he was irremovable therefrom during each of such years; but they contend that he was in law removable during the whole time of his residence at Enfield by virtue of the provisions of 9 & 10 Vict. c. 66, s. 1, as amended by 11 & 12 Vict. c. 111, on the ground that the father and, after his death, the mother of the pauper were respectively removable from the said parish during the whole of such time. The appellants admit that the father and mother respectively would have been removable from the said parish if they had become chargeable at any time during the pauper's residence there, and that the pauper's settlement when he went to reside at Enfield was no other than—that is the same as—his father's and mother's, namely, in the parish of Paddington; but they contend that the proviso to s. 1 of 9 & 10 Vict. c. 66, as enacted in 11 & 12 Vict. c. 111, has no application to the present case on the ground that the words "having no other settlement than his or her own"

(1) [1912] A. C. 475.

should be construed as meaning "having no other settlement than the settlement derived from the father or mother," that the operation of the proviso is restricted in that sense and to that particular case, and that the pauper in the present case, having an independent settlement acquired by residence, namely, in Paddington, was not affected by it. In support of this contention reliance was placed upon certain passages in the judgments in *Mitford Union* v. *Wayland Union* (1), particularly the judgment of Lord Esher at p. 170. I see no reason for questioning the decision on the facts of that case. The pauper had no settlement other than that of her father, her father was not removable, and therefore under the proviso in question she was not removable; but as an authority on the correct exposition of the proviso in 11 & 12 Vict. c. 111 I think the case can no longer be relied on for three reasons: (1.) because it proceeded upon a view, since held to be erroneous by the House of Lords, of the construction to be placed on s. 35 of 39 & 40 Vict. c. 61; (2.) because that erroneous view was applied to the construction of this proviso to make it consistent with s. 35; and (3.) because the governing reason for the construction placed upon the proviso was to limit its application to cases where, if it were not so applied, a separation would be effected between parent and child, and this was expressly disapproved in the House of Lords in the later case of *West Ham Union* v. *St. Matthew, Bethnal Green.* (2) In that case Lord Herschell said the only test is whether the parent would have been removable; if so, the children are removable likewise. He had no occasion specifically to construe the words "having no settlement other than his or her own," but I can see no reason for giving to those words any other than their plain and natural meaning, or for limiting them in the manner suggested; and therefore the pauper in the present case during his residence at Enfield having no other settlement than his father's, namely, the parish of Paddington, was in my opinion removable because his father was removable, and consequently did not acquire a settlement in Enfield by such residence. The order of the justices should therefore be affirmed.

(1) 25 Q. B. D. 164. (2) [1894] A. C. at pp. 239, 241.

1915

PADDINGTON UNION v. WEST-MINSTER UNION.

LUSH J. read the following judgment:—The question which we have to decide in this case is whether the pauper, who was under the age of sixteen years, was at the date when the order was made for his removal to the Paddington Union legally settled there, or whether he had acquired, under the circumstances, a later settlement in the parish of Enfield. He had in fact originally acquired a settlement in the Paddington Union,—an independent settlement because he had resided there for the first few years of his life with his father and mother, who were irremovable during the whole period of their residence, and who themselves also acquired a settlement there. He was, however, when five years old, sent to a home at Enfield in the Edmonton Union, and resided there for nearly seven years, and if he was irremovable during that period he acquired a settlement there which superseded the original Paddington settlement. If he was not irremovable his residence at Enfield would not confer a settlement, as residence while a pauper is removable confers no settlement. In that case, therefore, his original settlement in Paddington continued, and the order of the justices was right. The question depends upon the true construction of the proviso to s. 1 of the Poor Removal Act, 1848, which was substituted for the proviso to s. 1 of the earlier Act, 9 & 10 Vict. c. 66. The proviso is as follows: "Provided always that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable notwithstanding any provisions of the said recited Act." If that proviso applies, that is to say, if the pauper, when he went to and resided in Enfield, had no other settlement than that which his father had up to his death in 1907 and that which his mother had after his death, he was removable during the whole period of his residence at Enfield, because both his father and mother would have been removable, and in that view of the matter his residence at Enfield conferred no settlement, and he therefore retained his settlement in Paddington. Is it correct to say that he had no other settlement than that of his father and mother? If the words are construed according to their natural meaning it appears to me to be clear that he had no other settle-

ment than that of his father and mother. His settlement was the same as theirs; they were all settled in Paddington. But it has been contended that the words mean "provided he (the infant pauper) has not acquired some settlement other than a settlement derived from his father or mother," in which view of the matter the pauper would not be subject to the proviso, because his settlement in the Paddington Union was independent and not derivative. Lord Esher and Lopes L.J. in *Mitford Union* v. *Wayland Union* (1) did no doubt state that that was the meaning of the proviso, but not only were the observations so made mere dicta not necessary to the decision in that case, but they were made in what has since been held by the House of Lords to be a mistaken view of the law. The view taken by the Court in that case was that an unemancipated child could not acquire an independent settlement, and that its settlement must be derivative. The House of Lords held in *West Ham Union* v. *Holbeach Union* (2) and other cases that that view was wrong. The dicta therefore cease to have any real weight, and cannot now be a guide to us in construing the proviso. Giving therefore to the words there used their natural and ordinary meaning the proviso does in my opinion apply, and the residence therefore in Enfield conferred no new settlement, and the order therefore was rightly made. I would add that I am fortified in this view as it is in accordance with and not contrary to the policy of these statutes, since it tends to prevent the separation of members of a family. That consideration could not, of course, justify doing violence to the plain terms of the statutes, but in this case the construction which I have put upon the proviso, so far from doing violence to the language, is I think in accordance with it.

Judgment for respondents.

Solicitors for appellants: *Collins & Co.*
Solicitors for respondents: *W. J. Fraser & Son.*

(1) 25 Q. B. D. 164, at pp. 170, 175. (2) [1905] A. C. 450.

J. F. C.

1915
April 28, 29.

ELLIS & CO. *v.* CROSS.

WESTACOTT, CLAIMANT.

Deed of Arrangement — Assignment to Trustee for Benefit of Creditors — Execution of Deed pursuant to prior Resolution of Meeting of Creditors — Execution not communicated to any Creditor — Revocability of Deed.

In pursuance of a resolution passed at a meeting of his creditors a debtor subsequently executed a deed of assignment of all his property to a person specified in the resolution as trustee for the benefit of his creditors. The deed was handed to the trustee's solicitor, but the fact of its execution was not communicated to any creditor :—

Held that, its execution not having been communicated to any creditor, the deed was revocable.

APPEAL from the Ilford County Court.

The plaintiffs, Ellis & Co., recovered judgment against the defendant, Cross, for a sum of money on November 9, 1914. Cross being then in financial difficulties, a meeting of his creditors was held on November 19, Cross being present, at which the following resolutions were passed :—

(1.) "That the debtor be called upon forthwith to execute a deed of assignment of all his property in favour of Mr. A. G. Westacott of . . . . as trustee for the creditors, with a committee of inspection composed of . . . ."

(2.) "Further, that before registration of the deed the debtor be urged to see his friends with a view to offering a composition."

(3.) "The committee is authorised hereby to permit the execution of the deed to be postponed if the estate is found to be in no immediate danger."

On November 23, at 12.20 P.M., Ellis & Co. obtained leave to issue execution on their judgment against Cross. Between that time and 1.15 P.M. on the same day Cross executed a deed of assignment of all his property to the claimant, Westacott, as trustee for his creditors, and the deed was at once handed to Westacott's solicitors. At 1.15 P.M. on November 23 a writ of fi. fa. was delivered by Ellis & Co. to the sheriff, who levied execution on the goods of Cross on the following day. On

the 24th, before the sheriff levied execution, Westacott had taken possession of the goods of Cross. The fact that the deed of assignment had been executed was not communicated to any creditor before the writ of fi. fa. was delivered to the sheriff.

Westacott claimed the goods seized in execution, and an interpleader issue was directed to be tried in the county court between him and the execution creditors. The county court judge held that, at the time when the writ of fi. fa. was delivered to the sheriff, the deed of assignment was revocable, the execution thereof not having at that time been communicated to any creditor; and he gave judgment in favour of the execution creditors.

The claimant appealed.

E. W. Hansell and *Roland Burrows*, for the appellant. Having regard to the facts, the claimant was not in this case merely the mandatory or agent of the debtor within the principle of *Garrard* v. *Lauderdale*. (1) The deed of assignment was executed by the debtor at the instance of his creditors and pursuant to the resolutions passed at the creditors' meeting. The claimant was by those resolutions nominated as the trustee and so became the agent or representative of the creditors. The principle of *Garrard* v. *Lauderdale* (1), that a voluntary deed of assignment by a debtor to a trustee for the benefit of creditors is revocable before it is communicated to creditors, does not therefore apply. This deed was executed in pursuance of the previous resolutions, to which the debtor had consented; it was executed in pursuance of a previous bargain and was not a mere voluntary assignment; and it was, therefore, irrevocable as soon as it was executed. In the judgment of the Court in *Siggers* v. *Evans* (2) the doctrine is stated to be that, "where a man makes a conveyance of his property to trustees in favour of his creditors of his own accord without a previous bargain and without communication to them, the deed is revocable." That shows that such a deed made in pursuance of a previous bargain is not revocable.

When a deed of assignment has been agreed to by a creditor before it has been executed, he cannot afterwards treat the deed

(1) (1831) 3 Sim. 1; 2 Russ. & My. 451. (2) (1855) 5 E. & B. 367.

1915

ELLIS & CO. v. CROSS.

as an act of bankruptcy and void, although its execution has not been communicated to him or he has not assented to it after its execution: *In re Michael* (1); *In re Jones Brothers* (2); *Ex parte Stray* (3); *Ex parte Alsop* (4); *In re Brindley.* (5)

If creditors have assented to the deed it becomes irrevocable because the relation of trustee and cestui que trust is then created between the trustee and the creditors: *Harland* v. *Binks.* (6) A prior assent has the same effect when the deed is executed as a subsequent assent: *Evans* v. *Jones.* (7)

The claimant having been nominated as the trustee at the creditors' meeting, the communication to him through his solicitors of the execution of the deed was a sufficient communication to the creditors through him as their agent or representative, and their assent to it must be presumed from their previous agreement.

The case of *Johns* v. *James* (8) is distinguishable upon the ground that there was not in that case any previous bargain or assent. [They referred also to *Acton* v. *Woodgate* (9) and *New's Trustee* v. *Hunting.* (10)]

G. Wightman Powers (*J. B. Matthews, K.C.*, with him), for the respondents. There is no authority for the contention that a deed of assignment executed in pursuance of a previous arrangement or bargain becomes irrevocable when executed without any communication to creditors. In *Siggers* v. *Evans* (11) the decision was only that, where the trustee is himself a creditor, communication to other creditors is not required to make the deed irrevocable. In *Johns* v. *James* (8) that was stated in the Court of Appeal to be the sole effect of that decision, and the principle of *Garrard* v. *Lauderdale* (12), that until communication to creditors the deed is revocable, was affirmed. To make the deed irrevocable there must be communication to and assent by creditors; but before communication there cannot be assent.

(1) (1891) 8 Morr. 305.
(2) [1912] 3 K. B. 234.
(3) (1867) L. R. 2 Ch. 374.
(4) (1859) 1 D. F. & J. 289.
(5) [1906] 1 K. B. 377.
(6) (1850) 15 Q. B. 713.
(7) (1864) 3 H. & C. 423.
(8) (1878) 8 Ch. D. 744.
(9) (1833) 2 My. & K. 492.
(10) [1897] 2 Q. B. 19.
(11) 5 E. & B. 367.
(12) 3 Sim. 1; 2 Russ. & My. 451.

[He referred to *Adnitt* v. *Hands* (1) and *In re Sanders' Trusts.* (2)]

Hansell replied.

BAILHACHE J. This is an appeal from the judgment of the county court judge on an interpleader issue tried at the Ilford County Court, where the question was whether the execution creditors could proceed with their execution or whether the trustee under a deed of assignment for the benefit of creditors made by the judgment debtor was entitled to the property seized in execution. The facts of the case are, shortly, that the plaintiffs recovered judgment against Cross on November 9, 1914. Cross was then in financial difficulties, and on November 19 there was a meeting of his creditors at which these resolutions were passed: [His Lordship read the resolutions.] On November 23 the judgment creditors, having at 12.20 P.M. on that day obtained leave to proceed to execution, delivered a writ of fi. fa. to the sheriff at 1.15 P.M. Between 12.20 and 1.15 P.M. on the 23rd Cross executed a deed of assignment of all his property to Westacott as trustee for the benefit of his creditors, and on November 24 Westacott took possession of the goods of Cross; and later on November 24 the sheriff seized those goods under the writ of execution. It is conceded that the property in the goods was bound as from the time when the writ of fi. fa. was delivered to the sheriff.

In order to decide whether the title of the trustee under the deed of assignment or the title of the execution creditors is the better it is necessary to decide whether the deed of assignment was, at 1.15 P.M. on November 23, a revocable or irrevocable instrument. From the authorities which have been cited it appears that as long ago as 1831, in *Garrard* v. *Lauderdale* (3) on an appeal to the Lord Chancellor, it was decided that a deed of assignment to a trustee for the benefit of creditors did not become irrevocable unless and until the fact of its execution was communicated to creditors. That decision seems to have been questioned several times but never to have been overruled, and

(1) (1887) 57 L. T. 370. (2) (1878) 47 L. J. (Ch.) 667.
(3) 2 Russ. & My. 451.

1915

ELLIS & Co. v. CROSS.

Bailhache J.

it is now well settled and established law. It was stated to be so in *Johns* v. *James* (1) by James and Baggallay L.JJ. in the Court of Appeal. It has been argued for the appellant that, although that is true, yet one exception arises in the case where the debtor executes the deed of assignment in pursuance of previous resolutions of, or at the previous request of, the creditors; that in such a case the deed is irrevocable when executed, there being a bargain between the debtor and the creditors that it shall be executed, which is a contract for a good consideration in pursuance of which the deed is executed; and that the decision in *Garrard* v. *Lauderdale* (2) does not apply to such a case. Counsel could not cite any direct authority for that proposition. The nearest approach to an authority was the passage in the judgment of the Court in *Siggers* v. *Evans* (3) as follows: "The doctrine by which it is sought to avoid the deed is, that, where a man makes a conveyance of his property to trustees in favour of his creditors of his own accord without a previous bargain and without communication to them, the deed is revocable and void as against creditors, as a voluntary conveyance."

It would appear by inference from that passage that the deed would not be revocable if executed in pursuance of a previous bargain. The facts of that case do not assist the argument for the appellant, for there the trustee was himself a creditor and it was held that the communication of the execution of the deed to the trustee and his assent to it made it irrevocable. Then, turning to the case of *Johns* v. *James* (1), we find that Bramwell L.J., referring to *Siggers* v. *Evans* (3), says: "It seems to me that the case merely decided this—that the deed was not a void or voidable one, that is to say, one which the grantor could nullify by proceedings on the ground that no interest had been given. That is all that that case decided, to my mind, and decided rightly enough, because it is manifest that Siggers, the grantee in that deed, had an interest given to him which he could have enforced until he had been satisfied in respect of it"; and James L.J. used language to the same effect. Treating that as a binding statement as to the decision in *Siggers* v. *Evans* (3), the argument for

(1) 8 Ch. D. 744. (2) 2 Russ. & My. 451.
(3) 5 E. & B. 367.

1915

ELLIS & Co. v. CROSS.

Bailhache J.

the appellant is founded solely upon an inference from the above passage in the judgment in that case, which was not necessary for the decision.

Apart from that, there is a long chain of authorities supporting the decision in *Garrard* v. *Lauderdale* (1), which lay down the rule that it is essential in order to make a deed of assignment for the benefit of creditors irrevocable that its execution should be communicated to creditors. There is no authority which says that a previous bargain to execute the deed is sufficient without communication of the fact of its execution. In the present case there was no communication to a creditor that the deed had been executed until after the writ of execution had been delivered to the sheriff, but only to the trustee who was not a creditor. That being so, the case falls within the principle laid down in *Garrard* v. *Lauderdale* (1) and not within any of the established exceptions to that principle. The judgment of the county court judge was, therefore, right, and this appeal must be dismissed.

SHEARMAN J. I am of the same opinion. On behalf of the claimant it has been argued that, although the execution of the deed of assignment was not communicated to any creditor, yet, being executed in pursuance of the prior resolutions passed at the meeting of creditors, it was irrevocable although the execution was not communicated to creditors. In my opinion there is no warrant for such a contention. Ever since the decision in *Garrard* v. *Lauderdale* (1) it has been clearly established that a deed of assignment for the benefit of creditors is a voluntary revocable instrument until its execution has been communicated to creditors, and that until communication to and acceptance by creditors the trustee is only a trustee for the debtor. An exception has been grafted on that rule by the decision in *Siggers* v. *Evans* (2), where the trustee was himself a beneficiary under the deed, and for that reason the deed was held not to be revocable although its execution had not been communicated to other creditors. Some dicta in that case seem to say that there may be other exceptions, and one of them was followed by Bacon V.-C.

(1) 2 Russ. & My. 451.

(2) 5 E. & B. 367.

1915

ELLIS & Co. v. CROSS.

Shearman J.

in *Johns* v. *James* (1). In that case in the Court of Appeal, however, it was pointed out that *Siggers* v. *Evans* (2) only decided that the deed was not revocable because the trustee was himself a creditor and a beneficiary, and the dicta in *Siggers* v. *Evans* (2) were dissented from. James L.J. said: "I am of opinion that it is not desirable to draw nice distinctions between cases, and to say that *Garrard* v. *Lauderdale* (3) is good law, and only good law for the exact facts. It appears to me to be based upon very good common sense, and it is desirable that those cases that are substantially the same as *Garrard* v. *Lauderdale* (3) should receive the same decision." In my opinion this case is substantially the same as *Garrard* v. *Lauderdale* (3), and the decision of the county court judge was right.

Appeal dismissed.

Solicitors for appellant: *Kilsby, Son & Edwards.*

Solicitors for respondents: *Rawson & Stevens.*

(1) 8 Ch. D. 744. (2) 5 E. & B. 367.
(3) 2 Russ. & My. 451.

J. H. W.

YOUNG *v.* GENTLE.

1915
April 28, 29.

Licensing Acts—Offences—Being found drunk on Licensed Premises after Closing Hours—Lodger—Licensing Act, 1872 (35 & 36 *Vict.* c. 94), *s.* 12.

Sect. 12 of the Licensing Act, 1872, which makes it an offence for a person to be found drunk on licensed premises, does not apply to a lodger on the premises who is found drunk thereon after closing hours. *Lester* v. *Torrens* (1877) 2 Q. B. D. 403 applied.

Case stated by Brighton justices.

An information was preferred on September 21, 1914, by W. B. Gentle, Chief Constable of Brighton (hereinafter called the respondent), under s. 12 of the Licensing Act, 1872 (1), against Charles Young (hereinafter called the appellant) for that he, the appellant, on September 14, 1914, was found unlawfully drunk on certain licensed premises called the Shelbourne Hotel and in the occupation of one Owen Ward.

Upon the hearing of the information the following facts were admitted or proved:—

(*a*) The Shelbourne Hotel was a fully licensed house situate in Middle Street, Brighton, and was in the occupation of one Owen Ward.

(*b*) At 1.20 a.m. on Monday, September 14, 1914, Police Inspector Fellingham accompanied by two constables demanded admission to the hotel and on entering the bar found the appellant and two other men there with glasses of stout in front of them. The appellant was then drunk. The inspector stated in evidence that the manageress, who was in the bar, said "They came here like it at 11 o'clock."

(*c*) On Sunday, September 13, 1914, about 3 o'clock in the afternoon, the appellant, who was then quite sober, called at the hotel and saw the manageress, and he (the appellant) there and then engaged a bedroom at the hotel for that (Sunday) night.

The appellant contended—

That as he had in the afternoon of Sunday, September 13,

(1) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12: "Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty not exceeding ten shillings . . . ."

1915

YOUNG v. GENTLE.

1914, bona fide engaged a room at Shelbourne Hotel he had thereby become a lodger and was not liable to a conviction for being drunk on licensed premises during the early hours of Monday morning, September 14, 1914.

The respondent contended that a lodger might be entitled to the privacy of his own room upon licensed premises, but that the appellant was in the public part of the Shelbourne Hotel drunk three hours after closing time.

The justices were of opinion that if the appellant had been found drunk in his bedroom they should not have felt justified in convicting him, but that as he was found drunk in the bar of a public room of the hotel, although after closing hours, he was guilty of the offence charged. They accordingly convicted him.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law.

Wootten, for the appellant. The justices were wrong in convicting the appellant. Sect. 12 of the Licensing Act, 1872, is one of a group of sections headed "Offences against Public Order" and should be construed in the light of that heading. The Act repealed the statutes of James I. which made it an offence to be found drunk anywhere, and if it had been intended to apply to the case of persons such as inmates and lodgers, who were on licensed premises which served them as their private dwelling, permanently or temporarily, special words applicable to them would have been used. In *Lester* v. *Torrens* (1) it was decided that a licensed person found drunk on licensed premises in his own occupation, after closing hours, could not be convicted under s. 12. That case was approved in its result, although not in its reasoning, by *Reg.* v. *Pelly*. (2) There it was held that a customer, not being an inmate or lodger, who was found drunk on licensed premises after closing hours and when the premises were in fact closed, could be convicted under s. 12. The Court did not adopt the reasoning in *Lester* v. *Torrens* (1) that licensed premises ceased to be licensed premises for the purposes of the section after closing hours as they were then no

(1) 2 Q. B. D. 403. (2) [1897] 2 Q. B. 33.

1915

YOUNG v. GENTLE.

longer open to the public; but Hawkins J. pointed out that the section could not mean that the landlord was to be subject to a penalty if he were found drunk while using the premises solely as his private dwelling. Upon that ground a lodger on licensed premises is exactly in the same position as the licensee. The authorities standing thus, it is to be noted that the Legislature in 1902 re-enacted by s. 1 of the Licensing Act, 1902, the same words of s. 12 of the Act of 1872, and it must be taken that those words were re-enacted with the meaning which the Courts in the two cases cited had placed upon them: see per James L.J. in *Ex parte Campbell.* (1) Further, the later case of *Thompson* v. *McKenzie* (2) contains valuable dicta in favour of the view now contended for. In that case Lord Alverstone C.J. said: "It is true that it has been held in *Warden* v. *Tye* (3) that the licensed person cannot be convicted under s. 13 [of the Act of 1872] of permitting himself to be drunk on his premises, and in *Lester* v. *Torrens* (4) it was held that neither can he be convicted under s. 12 of being found drunk on his premises after the closing hour. Nor can a lodger, or other person who is lawfully on the premises after the closing hour, be convicted because he is found drunk on the premises under s. 12. This seems to be involved in the decision in *Reg.* v. *Pelly* (5), where it was held that a customer, not being an inmate or lodger, who is found drunk in an inn after the closing hour may be convicted under s. 12." There Lord Alverstone C.J. clearly recognized that a lodger having the right to be on the premises, which for the time being is his home, is precisely on the same footing as the licensee. There is no justification for the distinction drawn in this case by the justices between the different parts of the licensed premises. A private room in a licensed house is part of the licensed premises: *Redgate* v. *Haynes* (6); and s. 110 of the Licensing (Consolidation) Act, 1910, defines "licensed premises" as "premises in respect of which a justices' licence has been granted and is in force," and by s. 112, sub-s. 2, that

(1) (1870) L. R. 5 Ch. 703, at p. 706.
(2) [1908] 1 K. B. 905.
(3) (1877) 2 C. P. D. 74.
(4) 2 Q. B. D. 403.
(5) [1897] 2 Q. B. 33.
(6) (1876) 1 Q. B. D. 89.

1915

YOUNG v. GENTLE.

definition is made applicable to the Licensing Act, 1872. The effect therefore is that the whole of the premises, public rooms and private rooms, are for this purpose on the same footing. Moreover, it is to be observed that ss. 61 and 62 of the Licensing (Consolidation) Act, 1910, permit the supply of intoxicating liquor during closing hours to lodgers, and this would include a sale in the bar or any other public part of the premises just as much as in the lodger's private room. The lodger's status is not changed according to what part of the premises he may happen to be in.

Rowand Harker, for the respondent. When Parliament was enacting by s. 12 of the Act of 1872 that "Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty," it meant what it said, and did not mean to except lodgers. Sects. 61 and 62 of the Licensing (Consolidation) Act, 1910, are a re-enactment in a slightly different form of s. 25 of the Act of 1872, and there lodgers are specifically mentioned. It is therefore legitimate to infer that if Parliament had intended to exempt lodgers from the provisions of s. 12 it would have done so in terms; the words of that section ought therefore to be construed according to their plain and natural meaning. In *Lester* v. *Torrens* (1), upon which reliance is placed on behalf of the appellant, the judges, appreciating that a licensee would be placed in a position different from an ordinary individual if the section were held to apply to him, adopted a line of reasoning for exempting him which has been expressly disapproved in later cases. The whole basis of the decision in *Lester* v. *Torrens* (1) was that "licensed premises" only meant licensed premises when they were open to the public, and as that basis has been declared to be unsound the judgment proceeding thereon is bad and the question is open for this Court to decide. The observations of Lord Alverstone C.J. in *Thompson* v. *McKenzie* (2) were obiter, and it is not correct to say that this point was involved in the decision in *Reg.* v. *Pelly*. (3) In *Lawson* v. *Edminson* (4) Lord Alverstone C.J. said: "*Reg.* v. *Pelly* (3) shews that a person who

(1) 2 Q. B. D. 403.
(2) [1908] 1 K. B. 905.
(3) [1897] 2 Q. B. 33.
(4) [1908] 2 K. B. 952.

is found drunk on licensed premises after closing hours may be convicted under s. 12, and we held in *Thompson* v. *McKenzie* (1) that premises do not cease to be licensed premises for the purpose of s. 13 merely because they are closed to the general public." If the Court should take the view that *Lester* v. *Torrens* (2) is a binding authority to the effect that a licensee who is found drunk on his own licensed premises is not liable to be convicted under s. 12, it may be difficult to differentiate the case of a lodger, but this point of distinction may be suggested: the licensee has to live on the premises, whereas the lodger can choose for himself where he will lodge. [He also referred to *Pine* v. *Barnes* (3), *Atkins* v. *Agar* (4), and *Kessack* v. *Smith.* (5)]

Wootten in reply. The only part of *Lester* v. *Torrens* (2) which has been disapproved in later cases was the statement that where licensed premises are closed they cease to be licensed premises. The decision that the licensee of premises cannot be convicted under s. 12 still stands, and was in fact approved in *Reg.* v. *Pelly.* (6)

[LORD COLERIDGE J. Lodgers are excepted in s. 25 of the Act of 1872, whereas no reference is made to them in s. 12.]

Sects. 80 and 81 of the Licensing (Consolidation) Act, 1910, which make it an offence for a drunken person to refuse to quit licensed premises when requested to do so and enable constables to enter and expel such person, is in general terms, but, obviously, it cannot be read as including the inmates or lodgers.

[AVORY J. Can you reconcile your argument with the judgments in *Lawson* v. *Edminson?* (7)]

Yes. That was a case under s. 13 of the Act of 1872 for permitting drunkenness upon the licensed premises. It was found as a fact that the persons found drunk were bona fide guests of the licensee, and no attempt was made to show that he had taken any steps to prevent drunkenness. The men being guests, the licensee could have terminated their licence to remain, but he did not do so and thus permitted drunkenness.

(1) [1908] 1 K. B. 905.
(2) 2 Q. B. D. 403.
(3) (1887) 20 Q. B. D. 221.
(4) [1914] 1 K. B. 26.
(5) (1905) 7 F. (J. C.) 75.
(6) [1897] 2 Q. B. 33.
(7) [1908] 2 K. B. 952.

1915

YOUNG v. GENTLE.

LORD READING C.J. On the afternoon of Sunday, September 13, 1914, the appellant went to the Shelbourne Hotel, Brighton, and engaged a bedroom there for that night. He was then sober. At 1.20 on the Monday morning the police demanded admission to the hotel; they entered the bar of the hotel, and there they found the appellant and two other persons with glasses of intoxicating liquor in front of them, the appellant being then drunk. Upon those facts the appellant was convicted before the justices of the offence created by s. 12 of the Licensing Act, 1872, which provides that "Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty not exceeding ten shillings." The case stated raises the question whether the appellant had committed an offence under s. 12 in view of the fact that he was a lodger for that night in the hotel, and was not in the position of an ordinary customer who entered the hotel merely for the purpose of obtaining drink; he was a person who was on the premises which for that night had become his home and it mattered not whether he was found in the bar or in his bedroom.

It was argued before the justices and before us that a lodger or an inmate of the licensed premises is not a "person" within the meaning of s. 12, and upon the answer to that argument depends the determination of this case. Undoubtedly the words at the beginning of the section—"Every person"—are sufficiently wide to include the landlord, the inmates of the premises, and a lodger, but it was decided in *Lester* v. *Torrens* (1) that the landlord, if found drunk on licensed premises in his own occupation, and when the premises are closed to the public, is not committing an offence against s. 12. The Court in that case came to that conclusion apparently—certainly partly—because it found that the premises had ceased to be licensed premises. Once the hour for closing arrived the judges seem to have thought that the premises were no longer licensed premises and must be treated as the private house of the individual residing there. If the Court in that case had confined itself to saying that for the purposes of s. 12 regard must be had to those who

(1) 2 Q. B. D. 403.

were on the premises and using them as their private house or sleeping place, we could better understand the decision, but when the judges said that the premises were not licensed premises after closing time had arrived the reasoning is undoubtedly fallacious. When that case was subsequently considered in *Reg.* v. *Pelly* (1) the view was expressed that the reasoning in *Lester* v. *Torrens* (2) was wrong, at least in part, but that the conclusion at which the Court there arrived was right. In *Reg.* v. *Pelly* (1) the Court concurred in the view that a landlord who is found drunk on his own licensed premises after closing hours has not committed an offence under s. 12; the judges drew a distinction between the case of a landlord and the case of a customer—in *Reg.* v. *Pelly* (1) the Court was dealing with the case of a person who was not the landlord and was not an inmate or lodger—and they said that if a mere customer was found drunk on licensed premises after closing hours he might be convicted under s. 12, as he had no right to be there in any private capacity, and was not on the premises as his home but was there merely for the purpose of obtaining drink and consuming it there. Distinguishing the case of *Lester* v. *Torrens* (2), they came to the conclusion that the customer was rightly convicted, but it was necessary, in order to arrive at that conclusion, that they should dissent from the reasoning of the judges in *Lester* v. *Torrens* (2) to the effect that licensed premises were no longer licensed premises within the meaning of this section after closing time, and they did express their dissent. The result is that *Lester* v. *Torrens* (2) stands as a decision.

In the later case of *Thompson* v. *McKenzie* (3) the question again arose. There a guest arrived at an hotel after the closing hour and engaged a bedroom. At the time of his doing so he was drunk to the knowledge of the hotel manager. Shortly afterwards he was found drunk on the premises by a constable. It was held that the hotel proprietor was properly convicted of permitting drunkenness upon his premises, because by reason of these facts he could not discharge the burden cast upon him by s. 4 of the Licensing Act, 1902, of establishing that he had taken

(1) [1897] 2 Q. B. 33. (2) 2 Q. B. D. 403.
(3) [1908] 1 K. B. 905.

1915

YOUNG v. GENTLE.

Lord Reading C.J.

all reasonable steps to prevent drunkenness upon his premises. That case has no bearing upon the present question except that in it the cases of *Lester* v. *Torrens* (1) and *Reg.* v. *Pelly* (2) were discussed. In giving judgment Lord Alverstone C.J. made this observation in reference to those two cases: "It is true that it has been held in *Warden* v. *Tye* (3) that the licensed person cannot be convicted under s. 13 of permitting himself to be drunk on his premises, and in *Lester* v. *Torrens* (1) it was held that neither can he be convicted under s. 12 of being found drunk on his premises after the closing hour. Nor can a lodger, or other person who is lawfully on the premises after the closing hour, be convicted because he is found drunk on the premises under s. 12. This seems to be involved in the decision in *Reg.* v. *Pelly*." (2) Then he added: "But it is one thing to say that the drunken lodger cannot be convicted himself under s. 12, it is another thing to say that the licensed person cannot be convicted under s. 13 of permitting him to be on the premises." Quite clearly what the Court was dealing with in that case was the offence of the licence-holder permitting drunkenness. The judges held that that offence had been committed; they did not express dissent from the conclusions of the Court in *Lester* v. *Torrens* (1) and in *Reg.* v. *Pelly* (2); the Lord Chief Justice approved of them and went so far as to say, although no doubt it is only a dictum: "Nor can a lodger, or other person who is lawfully on the premises after the closing hour, be convicted because he is found drunk on the premises under s. 12." If that dictum is a correct statement of the law, this conviction cannot stand.

I desire to call attention further to s. 1, sub-s. 1, of the Licensing Act, 1902, because, to my mind, it has a bearing upon the case we are now considering. I refer to the Act of 1902 for the reason that, as expressed by James L.J. in *Ex parte Campbell* (4): "When once certain words in an Act of Parliament have received a judicial construction in one of the superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the

(1) 2 Q. B. D. 403.
(2) [1897] 2 Q. B. 33.
(3) 2 C. P. D. 74.
(4) L. R. 5 Ch. 703, at p. 706.

Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them." Now in 1902 the Legislature repeated the words which are to be found in s. 12 of the Licensing Act, 1872; some words were added, but the material words are repeated almost ipsissima verba. Therefore, after the decisions in *Lester* v. *Torrens* (1) and *Reg.* v. *Pelly* (2), the Legislature deliberately used the same language which had received an interpretation not only of a Court of competent jurisdiction, but of a Court of co-ordinate jurisdiction with this Court, and in my view we are not entitled at this date to consider the question as if it were res integra. We must decide it in accordance with the decisions of Courts of co-ordinate jurisdiction, which have already dealt with it. If, therefore, we come to the conclusion that *Lester* v. *Torrens* (1) is good law, that decision binds us, and in my opinion it is a binding authority; it has stood since 1877; in licensing statutes passed since that date no alteration has been made in the material words of the section on which it was decided; and whatever our view might be if we could consider the matter as res integra, we are bound by, and must follow, *Lester* v. *Torrens*. (1)

It is worthy of observation that if we were to affirm this conviction the result would certainly be to change what has hitherto been adopted as the practice of the law, certainly since 1877 if not before, because it would result in this, that if the landlord is not to be exempted from the operation of s. 12, and the lodger also, if found drunk on the premises, is committing an offence under s. 12, it would necessarily follow that a person who is residing at an hotel—a not unfamiliar state of things at the present day—and is found drunk in the room which he habitually occupies—where he resides—is committing an offence and might be summoned. It would further follow that if he was also incapable he might be apprehended, and it would further follow, as has been pointed out, that under s. 81 of the Licensing (Consolidation) Act, 1910, the police would have the right at any time to enter the premises, and, finding him in bed drunk and incapable, they would have the right to remove him and take him to the police station. It is not for me to say

(1) 2 Q. B. D. 403. (2) [1897] 2 Q. B. 33.

1915

YOUNG v. GENTLE.

Lord Reading C.J.

whether that might not be a very salutary state of things, but if we were so to hold we should be going very much further than the law as hitherto expounded or declared would warrant us. We must follow *Lester* v. *Torrens* (1), and, that being so, it is really conceded that there is no distinction to be drawn between the case of a lodger and the case of the landlord. A lodger in, and an inmate of, licensed premises must stand in the same position. It seems to me that the decision in *Lester* v. *Torrens* (1) is to be supported upon the ground that persons of the class I have mentioned are on the licensed premises in their capacity of residents in a private house, not that the premises cease to be licensed premises. As the decision in that case binds us, and I can see no justification for distinguishing between the bar and the bedroom, it follows that this conviction is wrong and must be quashed.

LORD COLERIDGE J. If this case were free from authority, the argument in favour of upholding the conviction would be strong. It is conceded that licensed premises do not cease to be licensed premises after closing time. The appellant was found on licensed premises; he was found there drunk; he is a "person," and the Licensing Act, 1872, makes no special exemption in his favour as a lodger, whereas when another class of offences is dealt with lodgers are specifically exempted. Sect. 62 of the Licensing (Consolidation) Act, 1910 (reproducing s. 25 of the Act of 1872), exempts inmates, servants, lodgers, and bona fide travellers from the provision of the Act which says that if a person is found on licensed premises after closing hours he shall be guilty of an offence. The Legislature in s. 12 of the Act of 1872 makes no exception in favour of certain classes of persons when dealing with the offence of being found drunk on licensed premises. The reason may be that it was found unnecessary to do so when s. 12 was re-enacted by s. 1 of the Act of 1902 in view of the interpretation which had been put upon the words "Every person" by the decisions. The case of *Warden* v. *Tye* (2), where it was held that a landlord could not be convicted of permitting himself to be drunk on licensed premises, left the question open

(1) 2 Q. B. D. 403. (2) 2 C. P. D. 74.

whether or not the landlord could be convicted of being found drunk on those premises. Then came the case of *Lester* v. *Torrens* (1), where it was held that a licensee found drunk on his own premises cannot be convicted under s. 12, the ground upon which the decision was based being that licensed premises were not "licensed premises" within s. 12 after closing hours. That reasoning was not adopted in subsequent cases, and the decision in *Lester* v. *Torrens* (1) has been upheld upon the view that the landlord is a person entitled to be on the premises which are in a sense his private house, and therefore qua himself and his position as landlord are not, after closing hours, licensed premises within s. 12. In *Reg.* v. *Pelly* (2) the Court held that a customer did not come within the exemption, so that where a customer was found drunk upon licensed premises after closing hours he was held to have been rightly convicted of being found there drunk, the reason being that he had no right to be there, not being in the position of the landlord, a lodger, a bona fide traveller, or inmate. Though it may be that the reasons given for that decision were obiter, the case can be supported without reference to the specified persons, and that case purported to interpret for the future the meaning of the language of s. 12. Similarly *Lawson* v. *Edminson* (3), which decided that where guests were found drunk on licensed premises after closing hours the landlord could be convicted of permitting drunkenness, left it open whether or not this question was affected, because, although Bigham J.'s observations are very general—he said it was immaterial whether the men who were found drunk on the licensed premises were guests or not, "they were in fact drunk on licensed premises, and therefore the respondent was prima facie guilty of the offence of permitting drunkenness on licensed premises"—that was only in view of the question of permitting drunkenness. There may be, as my Lord has pointed out, strong reasons for adhering to the decisions on s. 12 of a Court of competent jurisdiction. I base my decision upon the ground that they have decided this question in a way which compels us to hold that this conviction cannot be upheld.

(1) 2 Q. B. D. 403. (2) [1897] 2 Q. B. 33.
(3) [1908] 2 K. B. 952.

1915

YOUNG v. GENTLE.

AVORY J. I am of the same opinion. The justices convicted the appellant solely on the ground that he was found drunk in the bar of a public room of the hotel after closing hours, and they say expressly that if he had been found drunk in his bedroom they would not have felt justified in convicting him. It is apparent from that finding that the justices adopted the view of the law which has just been pronounced in this Court, but that in this particular case they found, or thought they found, a distinction in the fact that the appellant was found drunk in the bar of the licensed premises and not in a private room of his own for the time being. That distinction cannot be justified. The whole of the premises are licensed, and after they are closed I think it can make no difference for the purposes of this section whether the person who is found drunk is found in the bar, or in the billiard room, or in his own bedroom. With the other members of the Court I regret that it is not open to us to construe s. 12 according to its plain and natural meaning. It would be much more satisfactory if the section had originally been construed to the effect that the words "every person" mean and include every person, and that the words "licensed premises" mean licensed premises whether at night time or in the day time. They are licensed premises during the night as much as during the day, and for some purposes it has been so decided. I venture to go further and express my regret that the Legislature in consolidating the licensing law in 1910 did not revert to the law as it was in the time of James I. and make it an offence for any one to be found drunk anywhere, whether in his own private house or elsewhere. It was the repeal of the statute of James that gave rise to the foolish saying that a man has the right to get drunk in his own house. It is not, however, open to us to construe this section according to its plain and natural meaning; the Courts have put a limitation upon it, and the judgment of Lush J. in *Lester* v. *Torrens* (1) coupled with the judgment of Hawkins J. in *Reg.* v. *Pelly* (2) have formed part of the law upon this subject and the practice of the Courts in administering it for many years. In *Lester* v. *Torrens* (1) Lush J. said: "I think, looking at the collocation of words, that 'licensed

(1) 2 Q. B. D. 403. (2) [1897] 2 Q. B. 33.

premises,' for the purposes of the section, must mean premises open to the public during licensed hours, or during the time when the premises are a quasi-public place. It seems to me that the innkeeper, if drunk on his own premises while they are open, is as much amenable to the penalty as if he was found drunk on the highway. It is clear, however, that the section does not apply to a person, not being an innkeeper, found drunk in his own private house. If the innkeeper lived next door to the licensed premises, he might be drunk in his own house without being liable. Why should he be liable if he lives on the licensed premises and gets drunk at a time when they are not open, because during certain hours of the day they are open to the public? When they are closed, they are as much his private house as a house in which he lives next door." It is clear that these observations would apply equally to the case of a lodger. In *Reg.* v. *Pelly* (1) Hawkins J., in dealing with *Lester* v. *Torrens* (2), said: "All that was proved was that while using [the licensed premises] as his private dwelling [the licensee] was found in a state of intoxication. Under those circumstances, the Court said that the Act could not mean that the landlord was to be subject to a penalty if he were found drunk while using the premises solely as his private dwelling." These two cases taken together appear to establish the proposition that a person using premises, although they are licensed premises in the sense that a licence has been granted to them, as his private dwelling cannot be convicted under s. 12 if he is found drunk there after closing hours. I also agree that this view is, if not confirmed, made more difficult for the Court to reject when we have regard to the amendment of the law in 1902 providing that a person found drunk under the conditions specified in s. 12 of the Act of 1872 may be apprehended. For these reasons I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *C. R. Sawyer & Withall, for J. C. Buckwell & Webb, Brighton.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Hugo Talbot, Brighton.*

(1) [1897] 2 Q. B. 33. (2) 2 Q. B. D. 403.

J. S. H.

1915
April 27.

GOBY *v.* WETHERILL.

County Court—Trial with a Jury—Retirement to consider Verdict—Stranger in Room with Jury for a Substantial Time—Invalidity of Verdict.

The presence of a stranger in the room with a jury for a substantial time while they are considering their verdict is of itself sufficient to invalidate their verdict.

Appeal from the Ramsgate County Court.

At the trial of this action with a jury in the county court the jury retired to consider their verdict in charge of an official, called the town sergeant, who acted as the usher of the Court. The town sergeant went into the retiring room with the jury and remained there for about twenty minutes while they were considering their verdict. A verdict having been found for the defendant, the plaintiff applied for a new trial upon the ground, among others, that the town sergeant was with the jury while considering their verdict.

The county court judge, in refusing the application, said: "An application for a new trial has been made on several grounds. The first is that the town sergeant, to whose care the jury were intrusted, from a mistaken sense of duty remained in the room with them whilst they considered their verdict. This, of course, he should not have done, and, if he had interfered in any way with their deliberations, the verdict could not be considered a satisfactory one. I have caused careful inquiries to be made into the matter, and, as a result, I am satisfied beyond shadow of doubt that throughout the jury's deliberations he remained a silent figure in the room, and neither by word nor deed interfered in any way. The foreman of the jury has made an affidavit which leaves no room for doubt on the subject. Such an irregularity should not, in my opinion, nullify the carefully considered verdict of a jury in a civil action."

The plaintiff appealed.

Schiller, K.C., and *David White*, for the appellant. The fact that a stranger was with the jury during their deliberations is of

itself sufficient to invalidate the verdict. The Court will not look at or consider any evidence given by the jury that the stranger did not interfere: *Rex* v. *Willmont* (1); nor ought it to accept any evidence or statement from the stranger, for his conduct is impugned. It is, therefore, practically impossible in such cases to ascertain what passed while the stranger was present and whether he interfered or not, and the only rule that can be applied is of necessity that the verdict must be set aside.

Cecil Ince, for the respondent. The learned county court judge did not act solely upon the affidavit of the foreman of the jury. He says in his note that he had made careful inquiries, which must have been made of the official himself; and in *Rex* v. *Willmont* (1) the Court inquired of the clerk of assize as to what passed between him and the jury. The position of an official of the Court is very different from that of a mere stranger and there is no authority for saying that his mere presence in the jury room, without any evidence of discussion or interference, can invalidate the verdict. In *Rex* v. *Willmont* (1) it was proved by his own statement that the officer of the Court had advised the jury. Here the town sergeant was the official in charge of the jury, and in *Rex* v. *Crippen* (2), where the usher was with one of the jurymen for a long time, the verdict was upheld.

BAILHACHE J. I think that this appeal must be allowed. During the deliberations of the jury the town sergeant, in an excess of zeal, remained in the jury room for about twenty minutes. It is said that by his presence in that way the verdict is vitiated and cannot stand. I think that contention is right. The principle is that the jury are entitled, and bound, to deliberate in private. If a stranger, whether an officer of the Court or not, is present for a substantial time during their deliberations, then the verdict is vitiated. I regret having to come to this conclusion, for I daresay that no harm was done. This verdict must be set aside and a new trial held.

SHEARMAN J. I agree. It is a cardinal principle of the jury system that a jury must deliberate in private. In the present

(1) (1914) 78 J. P. 352. (2) [1911] 1 K. B. 149.

1915

GOBY v. WETHERILL.

case, during a substantial part of the time when the jury were deliberating, a stranger was present, namely, the town sergeant, and I cannot regard that as an immaterial or unimportant fact. I agree, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *White & Co.*

Solicitors for respondent: *Brennan & Brennan, Maidstone.*

J. H. W.

1915

May 5.

WHITTAKER *v.* LONDON COUNTY COUNCIL.

Tramway—Passenger wrongfully alleged to have travelled beyond Point allowed by his Ticket—Passenger ejected from Car by Conductor—Liability of Tramway Authority—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 51, 52.

In the case of a person who enters a tramcar and refuses to pay the proper fare for the distance travelled, the remedy of the tramway authority is not limited to that given by s. 52 of the Tramways Act, 1870, namely, the right to seize and detain him, if his name and address are unknown, until he can conveniently be taken before a justice or until he be otherwise discharged by due course of law; in such a case the tramway authority may treat the person offending as a trespasser and eject him from the tramcar provided no more force than is necessary is used.

The plaintiff, who had duly paid his fare, was ejected from one of the defendants' tramcars by the conductor, who was under the mistaken belief that the plaintiff was travelling beyond the point to which his ticket allowed him to travel. The plaintiff claimed damages from the defendants in respect of the injuries he sustained through being ejected:—

Held, that the defendants were liable for the wrongful act of their servant.

APPEAL from a decision of the county court judge sitting at Wandsworth.

On September 4, 1914, the plaintiff entered one of the defendants' tramcars and paid his fare. After having travelled some distance in the car, but not beyond the point to which his ticket entitled him to travel, he was ejected from the car by the conductor, and sustained injuries by falling into the street. At the

trial of an action by the plaintiff claiming damages from the defendants the jury found, in answer to certain questions, that the plaintiff was not in fact, and was not thought by the conductor to be, intoxicated; that he was ejected from the car on the ground that the conductor thought that he was endeavouring to travel to a point beyond which his ticket allowed him to travel; that he was not ejected through the malice or spite of the conductor; and that the injuries he suffered were the result of his being ejected. They assessed the damages at 30*l.*

The county court judge entered judgment for the defendants as he came to the conclusion that the conductor was not acting within the scope of his authority in assaulting and ejecting the plaintiff from the car.

The plaintiff appealed.

McCall, K.C. (*Martin O'Connor* with him), for the plaintiff. The county court judge was wrong in entering judgment for the defendants. A master is answerable for every wrongful act of his servant committed in the course of the service: *Barwick* v. *English Joint Stock Bank* (1); *Bayley* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2); *Farry* v. *Great Northern Ry. Co.* (3); and this is so even where the act of the servant is criminal: *Dyer* v. *Munday.* (4) It was said in *Barwick* v. *English Joint Stock Bank* (1) that to make the master responsible, the act, besides being done by the servant in the course of the service, must also have been done for the master's benefit, but this latter part of the statement was held to be erroneous in *Lloyd* v. *Grace, Smith & Co.* (5) The present case comes clearly within those authorities. In the course of the argument in *Bayley* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2) Willes J. anticipated this very case when he said, at p. 417, "Surely there must be authority to remove in various other cases than those of smoking and intoxication . . . . If a man were in a carriage without a ticket, and refused to come out, would there not be authority to treat him as a trespasser and pull him out, using no more force than necessary?" *Poulton* v. *London and*

(1) (1867) L. R. 2 Ex. 259, at p. 265.
(2) (1872) L. R. 7 C. P. 415.
(3) [1898] 2 I. R. 352.
(4) [1895] 1 Q. B. 742.
(5) [1912] A. C. 716.

1915

WHITTAKER v. LONDON COUNTY COUNCIL.

South Western Ry. Co. (1), which was relied upon for the defendants in the Court below, has no bearing upon the present case.

Craig Henderson, for the defendants. In the cases relied upon for the plaintiff the act complained of might lawfully have been done by the master, and therefore an authority for the servant to do it could be implied, but where a master has no power himself to do a particular act, no authority can be implied from him to his servant to do it: *Poulton* v. *London and South Western Ry. Co.* (1); *Charleston* v. *London Tramways Co.* (2) In this case the defendants would have had no power themselves to eject the plaintiff from the tramcar. For a person to travel without paying his fare is made an offence by s. 51 and the sole remedy is given by s. 52 of the Tramways Act, 1870. (3) Sect. 52 only enables the tramway authority's servant to seize and detain the offender whose name and address are unknown, until he can be brought before a justice of the peace. The precise point arising in this case was discussed but was left undecided in the judgment of Kennedy L.J. in *Hutchins* v. *London County Council.* (4) In *Wolverhampton New Waterworks Co.* v. *Hawkesford* (5) Willes J. specified the three classes of cases "in which a liability may be established founded upon a statute. One

(1) (1867) L. R. 2 Q. B. 534.

(2) (1888) 4 Times L. R. 629.

(3) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 51: "If any person travelling or having travelled in any carriage on any tramway avoids or attempts to avoid payment of his fare, or if any person having paid his fare for a certain distance knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, or attempts to avoid payment thereof, or if any person knowingly and wilfully refuses or neglects on arriving at the point to which he has paid his fare to quit such carriage, every such person shall, for every such offence, be liable to a penalty not exceeding forty shillings."

Sect. 52: "It shall be lawful for any officer or servant of the promoters or lessees of any tramway, and all persons called by him to his assistance, to seize and detain any person discovered either in or after committing or attempting to commit any such offence as in the next preceding section is mentioned, and whose name or residence is unknown to such officer or servant, until such person can be conveniently taken before a justice, or until he be otherwise discharged by due course of law."

(4) (1914) Unreported.

(5) (1859) 6 C. B. (N.S.) 336, at p. 356.

is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common-law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it." The present case falls within the third of those classes.

[LAWRENCE J. The defendants own the tramcars. Why cannot they exercise their common law right to eject a person who is a trespasser thereon?]

There cannot be a trespass committed on the car while it is plying for hire. Any one of the public has the right to enter a tramcar: see per Phillimore L.J. in *Myers* v. *Bradford Corporation*. (1) A tramway authority has a statutory duty to carry passengers; in this respect the position differs from that of railway companies who only carry passengers by virtue of contract. The only case in which a person can lawfully be ejected from a tramcar is where he is intoxicated; this power is specifically given to the defendants by their by-laws.

[BAILHACHE J. Is not s. 52 of the Tramways Act, 1870, merely an additional remedy given to the tramway authority, and not an exclusive remedy?]

Sect. 52 gives an exclusive remedy. There is no reservation of common law powers or remedies as there is in certain other sections of the same statute: see for example ss. 27, 38, and 50. As, therefore, the plaintiff could not lawfully be ejected for non-payment of his fare, the defendants are not liable for the act of the conductor which was not within the scope of his authority.

No reply was called for.

(1) [1915] 1 K. B. 417, at p. 429.

1915

WHITTAKER v. LONDON COUNTY COUNCIL.

LAWRENCE J. In this case the county court judge, notwithstanding that the jury found the questions submitted to them in favour of the plaintiff, entered judgment for the defendants. The plaintiff now appeals from that decision. The facts were that the plaintiff having entered one of the defendants' tramcars and after having travelled some distance was ejected by the conductor upon the ground, as found by the jury, that the conductor mistakenly thought that he was endeavouring to travel beyond the point to which his ticket allowed him to travel; that is to say, the conductor thought that the plaintiff was attempting to commit a trespass by remaining in the car without having paid, and without being ready to pay, his fare, and on that account the conductor ejected him. In those circumstances, it is not, in my opinion, correct to say, as was contended by counsel for the defendants, that the defendants as the tramway authority could not themselves have ejected the plaintiff; it seems to me that, though the act done by the conductor was contrary to what the defendants intended he should do, it was not legally impossible for the defendants to do it or for the conductor to have the defendants' authority delegated to him to do it. The case comes exactly within the first of the three classes specified by Willes J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1), that is to say "where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common-law remedy, the party suing has his election to pursue either that or the statutory remedy." In my opinion the defendants, as the tramway authority, have a right of property in their cars, and have the right to protect them from trespass by a person remaining therein or thereon without paying, or intending to pay, his fare, and in order to protect their property they may eject such a person from their car. A person by merely mounting a tramcar does not escape the common law liability to be treated as a trespasser if in fact he is one. It is true that there

(1) 6 C. B. (N.S.) 336, at p. 356.

are other remedies given to the defendants by the Tramways Act, 1870, and their by-laws, but those are not exclusive remedies; and therefore I think that the question left open by Kennedy L.J. in *Hutchins* v. *London County Council* (1) must be answered by saying that a trespasser such as I have referred to can lawfully be ejected from a tramcar. To construe the statute otherwise would render the position of tramway authorities ridiculous, as in many cases they would be quite unable to protect their own property. In this case the act done by the conductor was one which he purported to do for his employers, and having committed a tort in doing it, the plaintiff is entitled to recover damages from the defendants. Judgment ought therefore to have been entered for the plaintiff in accordance with the verdict of the jury. The appeal must be allowed.

BAILHACHE J. I am of the same opinion, and I desire to add a few words in deference to the very able argument presented on behalf of the defendants. It is clear that the conductor ejected the plaintiff from the tramcar because he mistakenly thought that the plaintiff was travelling beyond the point to which his ticket entitled him to travel. There can be no doubt that if the defendants were not a statutory body with limited powers, the act which was done by the conductor would be within the apparent scope of his authority, and the master would be liable. But it is said that this does not apply in the case of the conductor of a tramcar because the tramway authority is a statutory authority with limited powers, and such a body cannot delegate to its servants powers which it does not itself possess. In support of this proposition the case of *Poulton* v. *London and South Western Ry. Co.* (2) was cited. I have no doubt that that has been laid down with reference to various statutory authorities, including building societies, limited companies whose powers are defined by reference to their memorandum and articles of association, and tramway companies. Up to this point I agree with the argument of Mr. Craig Henderson, but I do not agree with him when he says that s. 52 of the Tramways Act, 1870, limits in

(1) Unreported.

(2) L. R. 2 Q. B. 534.

1915

WHITTAKER v. LONDON COUNTY COUNCIL.

Bailhache J.

such a case as this the defendants' powers as the tramway authority. Sect. 51, it is true, makes the act which the plaintiff was wrongly suspected of doing an offence punishable by a penalty of 40*s.*; and s. 52 says that when a tramway authority desires to treat the act as an offence, the offender may be detained by the authority's officer or servant until his name and address are ascertained for the purpose of knowing whom it has to prosecute under s. 51. But it is not said that that is to be the only remedy which the authority shall have; it appears to me that that is to be in addition to the other remedies which the authority would possess if s. 52 were not in the Act. One of the most obvious of the other remedies the authority must have is the common law right to treat a person who insists upon remaining in or on a tramcar without paying his fare as a trespasser, and one of the ways in which a trespasser may be dealt with is to eject him, using no more force than may be necessary. The defendants as the tramway authority have a perfect right to do that; and they are not bound to act under s. 52 and take the trespasser's name and address. If they eject him they do not want his name and address. It seems to me therefore that the county court judge was wrong, and this appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Yardley, Tilley & Co.*
Solicitor for defendant: *Edward Tanner.*

J. S. H.

[COURT OF CRIMINAL APPEAL.]

1915
April 19;
May 10.

THE KING *v.* GRUBB.

Criminal Law — Larceny — Fraudulent Conversion of Property — Person "entrusted" with Property — "Receipt" of Property for or on Account of another Person — Conversion to his own Use or Benefit or that of another Person — Dealings through a Company — Larceny Act, 1901 (1 *Edw.* 7, *c.* 10), *s.* 1.

A person may be "entrusted" with property, or may "receive" it "for or on account of any other person," within the meaning of s. 1 of the Larceny Act, 1901, notwithstanding that it is not delivered directly to him by the owner and that the owner does not know of his existence and has no intention of entrusting it to him. If a person has obtained or assumed the control of the property of another under circumstances whereby he *becomes* entrusted, or whereby his receipt *becomes* a receipt for or on account of another, and he fraudulently converts it, he commits an offence under s. 1. For the purpose of determining whether the offence has been committed, the words "being entrusted" must not be read as being limited to the moment of the delivery of the property by the owner, but may cover any subsequent period during which a person becomes entrusted with the property; and the words "having received" may cover the receipt at any time by a person who receives the property for or on account of another.

When property is, or is intended to be, entrusted to a company, and a person directing and controlling the company, by whose instructions the property has passed into the possession of the company and has been converted, intended to convert it fraudulently, that person may have committed an offence under s. 1 whether the property was fraudulently converted to the use or benefit of the company or to his own use or benefit. If he did the acts with an intent to defraud, it is no defence to an indictment under s. 1 to prove that he did them as the agent or servant of the company. If the company was used by his directions as the instrument to enable him in the name of the company to become possessed of the property and by means of the company to convert it fraudulently to his own use or benefit, he has committed an offence under s. 1.

Appeal against a conviction under the Larceny Act, 1901, for fraudulent conversion of property.

The appellant was indicted at the Central Criminal Court for having fraudulently converted to his own use or benefit, or to the use or benefit of another person, property entrusted to him for certain specific purposes and property received by him for or

1915

REX v. GRUBB.

on account of another person, under s. 1 of the Larceny Act, 1901. (1) The charges made against him were in respect of: (*a*) a sum of 894*l.* sent by one Miller for the purchase of 1200*l.* Consols; (*b*) certain shares sent by one Ranking for sale, with instructions to invest the proceeds in other shares; (*c*) a sum of 311*l.* sent by Ranking to purchase shares; and (*d*) a sum of 91*l.* sent by one Barthrop for the purchase of 100*l.* stock.

The following statement of the facts and evidence is taken from the judgment of the Court:—

Oliver & Partners, Limited, was a company formed under the Companies Act to carry on the business of stock and share brokers. In 1912 it went into liquidation and the goodwill of the business was purchased by the appellant, who formed a new company in August, 1912, with the name of H. St. John Oliver & Partners, Limited. This company took over the assets of the old company and carried on the business of stock and share brokers at 68, St. James's Street, Pall Mall, and paid or agreed to pay 400*l.* per annum for its offices. The appellant and one Oliver were the directors, Jones was the managing clerk, and other persons were employed. According to the evidence of Jones and Oliver the persons employed were engaged by the appellant. No business was conducted except under his instructions; Oliver superintended the routine of the business and sought customers; but no business of any importance was ever

(1) 1 Edw. 7, c. 10:

Sect. 1. "(1.) Whosoever—

"(*a*) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; or

"(*b*) having, either solely or jointly with any other person, received any property for or on account of any other person,

fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof, shall be guilty of a misdemeanour, ..."

Sect. 2. "(1.) Sections 75 and 76 of the Larceny Act, 1861, are hereby repealed.

"(2.) This Act shall have effect as part of the Larceny Act, 1861, and section 1 of this Act shall be deemed to be substituted for sections 75 and 76 of that Act, and references in any enactment to those sections shall be construed as references to section 1 of this Act."

transacted except under the directions of the appellant. The letters were placed before him and were answered or dealt with in pursuance of orders given by him. The appellant was in daily attendance at the office of the company, and the books of the company were also kept and the entries made under his directions. The pass-book of the company's banking account, and the accounts of clients with the company, were placed before him. Instructions for the purchase or sale of stocks or shares, payments by the company, and the dealing with moneys paid to the company took place under the sole direction and exclusive control of the appellant, who supplied money to the company and financed it. In the words of the managing clerk, "no one else had any control over the business of the firm." In November, 1912, the appellant resigned his position as director of the company because of some lawsuit in which he was concerned, and one Forde took his place. Forde was a friend of the appellant and had been some little time in the office of the company to learn the business. From April 7, 1913, to May 7, 1913, there were no directors of the company. No change whatsoever was ever made in the conduct of the business; it continued as before under the exclusive control and direction of the appellant. The company was wound up in June, 1913, and at that date it appears from the company's books that the company was indebted to the appellant in the sum of 1245*l.* The company never had sufficient business to make it a paying concern. The moneys paid into its banking account were derived from customers who sent either money to invest or shares to sell, or from the appellant. On December 14, 1912, a Miss Miller forwarded the sum of 894*l.* 2*s.* addressed to Oliver & Partners, Limited, the old company, with instructions to purchase Consols to the nominal value of 1200*l.* The letter was answered on December 16 in the name of the new company, H. St. John Oliver & Partners, Limited, enclosing a contract note showing the purchase by the company on her behalf of 1200*l.* Consols for the January Consols account. The contract note was a mere sham; no transaction had been executed in Consols. A book entry was made of a purchase of 1200*l.* Consols for Miss Miller from the T. G. W. Syndicate, Limited. The

1915

REX v. GRUBB.

T. G. W. Syndicate, Limited, was another company whose business was conducted at the same address by the appellant. Another entry recorded that the appellant had purchased 1200*l.* Consols for the T. G. W. Syndicate. These entries were mere fictitious records of transactions which had never taken place. They were made by the instructions of the appellant. The sum of 894*l.* 2*s.* was paid into the company's banking account. At that date the account was overdrawn to the extent of some 400*l.* against securities which had been deposited. The effect of the payment of Miss Miller's money was to put the company's account in credit and to release the securities held by the bank. Subsequently, Miss Miller having complained of the non-receipt of the Consols or interest on the same, a dividend of 7*l.* 1*s.* 3*d.*, purporting to be the amount received on the Consols, was sent to Miss Miller. No such sum had been received; it was debited to the account of the appellant with the company. It was not in dispute that no Consols had ever been purchased for Miss Miller and that the money sent by her had been fraudulently converted. There is abundant evidence that the material acts relative to Miss Miller's money were done by the direction of the appellant. The letters and documents were placed before him, and on various occasions both Oliver and Jones, respectively, mentioned to the appellant the omission to purchase the Consols on Miss Miller's account. The appellant denied all knowledge of the facts relating to Miss Miller until March, 1913, but it is evident from the verdict of the jury that they preferred the evidence of Oliver and Jones and rejected the appellant's.

In December, 1912, one Ranking forwarded to the company the certificate and transfer of certain shares, with instructions to sell them and purchase other shares. Subsequently, Ranking forwarded 311*l.* 6*s.* to the company with instructions to purchase shares for the amount. The appellant was aware of all the material facts and gave the directions relating to the dealings with the shares and the money. Fictitious records of transactions which had never taken place were made in the books of the company and sham contract notes were sent in the name of the company and, according to the evidence of Jones, by the directions of the appellant. Ranking never in fact received either

shares or money, and both the shares and the money sent by him were fraudulently converted. Similar transactions and with similar results took place with one Barthrop, who forwarded money to the company with instructions to purchase 100*l.* Japanese stock.

The defence of the appellant was that the property was entrusted to, or received by, the company and not to or by him, and that it was fraudulently converted by the company and not by him. He was convicted in respect of all the charges, and he appealed upon the grounds that there was no evidence to support the verdict and that the learned Recorder had misdirected the jury.

Hawke, K.C., and *Horace Douglas*, for the appellant. The property was not entrusted to or received by the appellant within the meaning of s. 1 of the Larceny Act, 1901. It was entrusted to or received by the company. The appellant, even if he were practically the only person having an interest in the company and controlling it, was not the company. A company is a legal entity entirely distinct from any individual who may practically have the whole interest in and control over it: *Salomon* v. *Salomon & Co.* (1); *Continental, &c., Co.* v. *Daimler Co.* (2); and this principle is equally applicable in criminal law: *Booth* v. *Helliwell.* (3) If the property was fraudulently converted, it was converted by the company and not by the appellant.

Sir S. O. Buckmaster, S.-G., Bodkin, G. A. H. Branson, G. Cecil Whiteley, and *Montague Shearman*, for the Crown. The company was merely the instrument of the appellant in every detail, the instrument through which he acted. All the acts were in reality the acts of the appellant and not of the company. The appellant could properly be convicted under s. 1 of the statute for acts done through the company as his agent or instrument. Knowledge by the person entrusting the property of the person to or by whom it is in fact entrusted or received is immaterial for the purposes of the Act. The appellant in fact received the property and became entrusted with it. Whether

(1) [1897] A. C. 22. (2) [1915] 1 K. B. 893.
(3) [1914] 3 K. B. 252.

1915

REX v. GRUBB.

the property was entrusted to or received by and converted by the company as the instrument of the appellant, or entrusted to or received by him as agent of the company and converted by him, he is guilty of an offence under the Act. Upon the evidence the jury could properly convict in either view.

Hawke, K.C., in reply, cited *Rex* v. *South.* (1)

Sir S. O. Buckmaster, S.-G., referred to *Rex* v. *Lord.* (2)

Cur. adv. vult.

May 10. The judgment of the COURT (Lord Reading C.J., Avory, Lush, Bailhache, and Shearman JJ.) was read by

LORD READING C.J. The appellant was convicted under the Larceny Act, 1901, of having fraudulently converted to his own use or benefit property entrusted to him for certain specific purposes and property received by him for or on account of another. He appeals to this Court to quash the conviction on two grounds: the first, that as a matter of law there was no evidence to support the verdict; the second, that the learned Recorder had misdirected the jury. If there had been no company in existence, there is no doubt that if there was evidence that the property had been entrusted to or received by the appellant there would have been ample evidence to support the conviction. But it is strenuously contended that the property was in fact and in law entrusted to or received by the company, and not to or by the appellant. It is not in dispute that the moneys were fraudulently converted, but the appellant says they were fraudulently converted by the company and not by him. The company, it is said, was duly formed and incorporated under the Companies Act, and therefore was a legal entity—a person: see *Salomon* v. *Salomon & Co.* (3) It is contended that the owner of the property intended in each case to entrust it to the company and not to the appellant, and that the property was in fact received by the company and not by the appellant; that, as the property came into the possession of the company and the moneys were paid into the banking account of the company and were entered in the books of the

(1) (1907) 71 J. P. 191. (2) (1905) 69 J. P. 467.
(3) [1897] A. C. 22.

company and were applied to the use or for the benefit of the company, the appellant could not be convicted of any offence under the statute. The question raised is of general importance, for, if the appellant's contention is right, it would follow that, by the interposition of a duly formed company as the person entrusted with the property or by whom it is received, no person could be convicted of offences under the Larceny Act, 1901, and indeed of any offence against the criminal law notwithstanding the undoubted fraudulent conversion of the property, since the company cannot be indicted and sent to prison. Sect. 1 of the Larceny Act, 1901, was passed for the purpose of meeting technical difficulties which had arisen in proving offences under ss. 75 and 76 of the Larceny Act, 1861, and was substituted for those sections. The first point to be decided in this case is whether there was evidence that the appellant was "entrusted" with the property in question or whether he received it for or on account of any other person. This Court has no doubt that, if the appellant was entrusted with the property or if he received it, there was evidence that he fraudulently converted it to his own use or benefit. In the opinion of this Court a person may be entrusted with property, or may receive it for or on account of another person, within the meaning of this section, notwithstanding that the property is not delivered to him directly by the owner and that in fact the owner does not know of his existence and has no intention of entrusting the property to him. If the accused has obtained or assumed the control of the property of another person under circumstances whereby he *becomes* entrusted or whereby his receipt *becomes* a receipt for or on account of another person, and fraudulently converts it or the proceeds, then he has committed an offence within the section. For the purpose of determining whether the offence has been committed, the words "being entrusted" should not be read as being limited to the moment of the sending or delivering of the property by the owner, but may cover any subsequent period during which a person becomes entrusted with the property. Equally the words "having received" may cover the receipt at any time by a person who receives the property for or on account of another. There cannot, however, be a

1915

REX v. GRUBB.

fraudulent conversion without an intent to defraud. A company has no mind and cannot have an intention; if the person directing and controlling the affairs of the company and by whose instructions the property has passed into the possession of the company and has been converted intended to convert it fraudulently, he would be guilty of an offence whether the property was fraudulently converted to the use or benefit of the company or to his own use or benefit. If he did the acts with an intent to defraud, it would not be an answer to prove that he did them as the agent or servant of another person whether a company or an individual. Moreover, if the company was used by his directions as the instrument to enable him in the name of the company to become possessed of the property and by means of the company to convert it fraudulently to his own use or benefit, he would be guilty of an offence under this statute.

Having now stated the law applicable, we proceed to examine the evidence. Where there is a conflict of testimony it must be considered by the light of the verdict. The charges made against the appellant and of which he was convicted were in respect of: [His Lordship then stated the charges and the facts and evidence as before set out.]

The Court is of opinion that there was ample evidence to support the conviction of the appellant in respect of all these charges. Whether the transactions are regarded as those of the company, directed and controlled by the appellant as the agent of the company, or whether they are regarded as the transactions of the appellant, using the company as the instrument to carry them out, there is abundant evidence that, although the property was sent to the company, the appellant obtained or assumed exclusive control over the property in question and that it was fraudulently converted by his directions. There was, therefore, evidence to support the conviction, and the appellant's first point fails.

Upon the argument as to misdirection of the jury by the learned Recorder, it is true that there are passages in the summing up which apparently fail to recognize the existence of the legal entity of the company as a separate person and which, taken alone, might convey the idea that a one man company was necessarily

a sham or bogus company; but viewed as a whole and without too minute an examination of the language of the Recorder, we are of opinion that it sufficiently directs the attention of the jury to the material questions of fact, namely, whether the appellant was the person who, having complete control of the affairs of the company, had become entrusted with or had received the property although nominally it was delivered to the company or paid into the banking account of the company, and whether the appellant had fraudulently converted the property either to the company's or to his own use or benefit. In our opinion the passages in the summing up of which complaint is made have not caused any substantial miscarriage of justice. If these observations had not been made by the Recorder, and if the direction had been quite accurate in law, the result on the facts of this case would have been the same, and the appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for appellant: *Good, Good & Co.*
Solicitor for the Crown: *Director of Public Prosecutions.*

J. H. W.

1915
May 13.

LEE *v.* AYKROYD.

Licensing Acts—Restriction of Sale, Consumption, or Supply of Intoxicating Liquor — Suspension during Specified Hours — Licensed Premises and Registered Clubs—Suspension "at an hour earlier than nine at night"—Order of Suspension from 10 P.M. *to* 6 A.M. *on the following Day in Case of Clubs—Approval of Secretary of State—Intoxicating Liquor (Temporary Restriction) Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 77), *s.* 1.

The Intoxicating Liquor (Temporary Restriction) Act, 1914, s. 1, sub-s. 1, provides that licensing justices may "by order direct that the sale or consumption of intoxicating liquor on the premises of any persons holding any retailers' licence in the area, and the supply or consumption of intoxicating liquor in any registered clubs in the area, shall be suspended while the order is in operation, during such hours and subject to such conditions or exceptions (if any) as may be specified in the order: Provided that, if any such order suspends the sale, supply, or consumption of intoxicating liquor at an hour earlier than nine at night, the order shall not have effect until approved by the Secretary of State."

Licensing justices made an order directing that "the sale or consumption of intoxicating liquor on the premises of persons holding retailers' licences, and the supply or consumption of such liquor in registered clubs, shall be suspended in the evening of each day, after the hour of 10 o'clock until 6 A.M. on the following day being a weekday, and 12.30 P.M. on the following day being a Sunday":—

Held, that the order did not suspend the sale, supply, or consumption of intoxicating liquor in registered clubs "at an hour earlier than nine at night," within the meaning of the proviso to sub-s. 1 of s. 1 of the Act, and took effect without the approval of the Secretary of State.

CASE stated by justices of the West Riding of Yorkshire.

An information was preferred by the respondent, Aykroyd, under the Intoxicating Liquor (Temporary Restriction) Act, 1914, against the appellant, Lee, the secretary of a registered club, for having unlawfully acted in contravention of an order made, under s. 1 of the Act, by the licensing justices for the licensing division of Upper Osgoldcross. The justices convicted the appellant and stated this case for the opinion of the Court.

Upon the hearing of the information the following facts were admitted or proved in evidence:—The appellant was the secretary of the Smawthorne Lane Working Men's Club, a duly registered club. On October 24, 1914, the licensing justices

made an order, under s. 1 of the Intoxicating Liquor (Temporary Restriction) Act, 1914 (1), as follows:

"The licensing justices for the said Riding, pursuant to the Intoxicating Liquor (Temporary Restriction) Act, 1914, hereby direct that on and after the 28th day of October, 1914, and until further notice, the sale or consumption of intoxicating liquor on the premises of persons holding retailers' licences, and the supply or consumption of liquor in registered clubs, in the said division, shall be suspended in the evening of each day, after the hour of 10 o'clock until 6 A.M. on the following day being a weekday, and 12.30 P.M. on the following day, being a Sunday."

A copy of the order was duly served upon the caretaker of the club upon October 28. On Sunday, December 20, at 11.15 A.M. or thereabouts, several members of the club were upon the club premises and were then and there supplied with intoxicating liquors. The order of October 24, 1914, had not received the approval of the Secretary of State within the meaning of s. 1, sub-s. 1, and the proviso thereto, of the Act.

It was contended on behalf of the appellant that the order, being an order suspending the supply or consumption of intoxicating liquor in a registered club, fell within the proviso to sub-s. 1 of s. 1 of the Act, and was unenforceable without the approval of the Secretary of State having been first obtained as thereby provided.

The justices were of opinion that the order did not require the approval of the Secretary of State within the proviso, and

(1) 4 & 5 Geo. 5, c. 77, s. 1, sub-s. 1: "The licensing justices for any licensing district may, if they think fit, upon the recommendation of the chief officer of police that it is desirable for the maintenance of order or the suppression of drunkenness in any area, by order direct that the sale or consumption of intoxicating liquor on the premises of any persons holding any retailers' licence in the area, and the supply or consumption of intoxicating liquor in any registered club in the area, shall be suspended while the order is in operation, during such hours and subject to such conditions or exceptions (if any) as may be specified in the order:

"Provided that, if any such order suspends the sale, supply, or consumption of intoxicating liquor at an hour earlier than nine at night, the order shall not have effect until approved by the Secretary of State."

1915

LEE v. AYKROYD.

accordingly convicted the appellant. The question for the opinion of the Court was whether the order of the licensing justices required the approval of the Secretary of State or not.

Waugh, K.C., and *Felix Palmer*, for the appellant. The order of the licensing justices clearly suspends the sale, supply, or consumption of intoxicating liquor "at an hour earlier than nine at night" in the case of clubs. Licensed premises, outside London at any rate, under the general licensing law cannot be open before 6 A.M. on weekdays and 12.30 P.M. on Sundays. In the case of clubs, however, there is no such general restriction, and the effect of this order is a suspension for six hours on weekdays, and twelve and a half hours on Sundays, before 9 at night. Any restriction applied to any part of a day before 9 P.M. is a suspension "at an hour earlier than nine at night." If this conviction is right, then without the approval of the Secretary of State the licensing justices can close all clubs from, say, 10 P.M. to 8 or 8.30 P.M. on the following day. That cannot be the meaning of the statute, for that construction would render nugatory the provision as to the approval of the Secretary of State.

Tindal Atkinson, K.C., and *Lowenthal*, for the respondent. It must be admitted that the words of the proviso to sub-s. 1 of s. 1 of the Act are capable of the construction for which the appellant contends. That is not, however, the necessary interpretation of the proviso. The words "suspends . . . . at an hour earlier than nine at night" refer only to the commencement of the suspension at night, and the approval of the Secretary of State is required only when that suspension at night is made to commence at an hour earlier than 9 P.M. Further, the Act relates to licensed premises and to clubs; licensed premises cannot be opened before 6 A.M. on weekdays and 12.30 P.M. on Sundays; this suspension order, therefore, does not operate in the case of licensed premises between midnight and 6 A.M. on weekdays and between midnight on Saturday and 12.30 P.M. on Sunday. It was intended to give the same effect to such orders under the Act in the case of clubs as in the case of licensed premises, and to put them on the same footing. That intention

will be carried out by interpreting these words as meaning that a suspension is not at an hour earlier than 9 P.M. in the case of clubs, if it is only for those hours of the morning during which licensed premises must be closed.

Waugh, K.C., replied.

LORD READING C.J. This case raises a point of interest and of some difficulty under the Intoxicating Liquor (Temporary Restriction) Act, 1914, one of the emergency measures passed by Parliament during the present war, which gives certain powers to the licensing justices to suspend the sale, supply, or consumption of intoxicating liquors.

The question in this case is whether an order made by the licensing justices suspending the sale, supply, or consumption of intoxicating liquor both on the premises of persons holding a retailers' licence and also in registered clubs from 10 o'clock each evening until 6 o'clock on the following morning for every weekday, and from 10 o'clock in the evening until half-past 12 o'clock on the next afternoon when that is a Sunday, requires the approval of the Secretary of State. It is contended for the appellant that, although he does not say there is no power to make such an order of suspension in the case of clubs, such an order cannot have effect until it is approved by the Secretary of State. For that contention he relies upon the words of the proviso to sub-s. 1 of s. 1, which are to the effect that if the order suspends the sale, supply, or consumption at an hour earlier than 9 at night there must be the approval of the Secretary of State before the order can have effect. That raises, as I have indicated, a point which is by no means free from difficulty. In this case the approval of the Secretary of State was not asked, and consequently it was not given, and the case therefore stands or falls upon whether or not the justices' order is effective without the approval of the Secretary of State.

Now, looking at the Act, the title of which is "An Act to enable Orders to be made in connection with the present War for restricting the Sale or Consumption of Intoxicating Liquor," it appears to me that Parliament intended that licensing justices should have the power to restrict the sale, supply, or consumption

1915

LEE
v.
AYKROYD.

Lord Reading C.J.

of intoxicating liquor either on licensed premises or in registered clubs within the limits of the proviso, that is, so long as they did not make the order operate before, or earlier than, 9 o'clock at night. That still leaves open the question as to what is meant by suspending the sale, supply, or consumption "at an hour earlier than nine at night." It seems to me that Parliament intended to put both public-houses and clubs on the same basis with regard to the restriction of intoxicating liquor. The object was to enable the justices to make orders which would, in districts where they thought it was necessary, restrict the power of persons to obtain liquor, and consequently of persons to supply it; and, if one looks at the object of the Act, it is just as important that it should operate with regard to clubs as with regard to public-houses. Looking a little closer into it, it is to be observed that the words of the statute are, "may by order direct that the sale or consumption . . . . shall be suspended while the order is in operation, during such hours and subject to such conditions or exceptions (if any) as may be specified in the order."

It is perfectly plain that, supposing an order is made suspending the sale of intoxicating liquor at a public-house from 10 o'clock at night, that means, without anything further being said, from 10 o'clock at night until the normal opening hour allowed by law the next morning. Parliament must be taken to have been aware of the fact that, for example in London, public-houses may be open after midnight—they are open in normal times until half-past 12 at night—and if, as was contended, the order was only to operate for the day to which the commencement of closing related, it would mean that at one minute past midnight the public-houses could open. That clearly is not right, and is not Mr. Waugh's real contention. That would not be reasonable, and he quite agrees that that is not the construction to be placed upon the proviso. Therefore the order can operate upon the next day, and if relating to London would certainly restrict the hours of supply from 10 o'clock at night not only until half-past 12 at night, but until the normal opening hour next morning. There is no difficulty with regard to public-houses.

Now, with reference to the clubs. Supposing the order is

made applicable to clubs, and suspends the sale and supply of liquor from 10 o'clock at night. If no time is fixed, as there is no normal opening hour it might be contended that that continued until the order itself was cancelled, but that would be an unreasonable view to take. It seems to me to have been intended that, when an order of suspension is made from 10 o'clock at night both for public-houses and clubs, it means only suspension from that time at night until the normal opening hours of licensed premises on the next morning; that seems to me to be the reasonable commonsense view. Any other point of view would lead to an absurdity which it cannot be thought that Parliament intended. If that is the true construction of the Act, and of the words of the proviso, then this order is good as a justices' order, because it suspends the sale, &c., from 10 o'clock at night until the normal opening hour the next morning, which in the case of Sunday is 12.30 P.M., and does not suspend it for any longer period. Therefore it seems to me that, within the meaning of the Act, this is an order which the licensing justices have power to make without the approval of the Secretary of State, and that only if they wish to make an order which suspends the sale or supply after the normal opening hours for licensed premises on a particular day and earlier than 9 o'clock at night is it necessary to get the approval of the Secretary of State before the order becomes effective. For these reasons I am of opinion that this appeal must be dismissed.

AVORY J. I agree. It is the duty of this Court, wherever the words of a statute admit of it, to give practical effect to the legislation and not to give effect to mere casuistry. As soon as it is recognized that this proviso is only intended to apply to the closing hour, and has no application to the hour of opening of public-houses, I think the difficulty entirely disappears. I agree with every word of the judgment which has just been pronounced.

LOW J. I agree with both the judgments that have just been delivered. It is admitted that the construction for which the appellant contends would raise many difficulties and absurdities.

1915

LEE v. AYKROYD.

LOW J.

Among others, it is only necessary to say that the consequence would be that all clubs would be entitled to open directly the public-houses closed. Now that, among other things, was one of the matters that Parliament certainly intended to prevent. The keynote, in my opinion, of this legislation is the intention of Parliament in this particular matter to put public-houses and clubs upon the same footing, and construing the Act from that point of view really no difficulty arises.

Appeal dismissed.

Solicitors for appellant: *Windybank, Samuell & Lawrence, for Claude Kemp, Castleford.*

Solicitors for respondent: *Clements, Williams & Co., for W. Vibart Dixon, Wakefield.*

J. H. W.

1915

March 31; *May* 13.

Ex parte MOSER.

Extradition—France—Person convicted of Robbery with Violence in France—Escape from Prison while undergoing Sentence—Person "convicted of a crime"—"Fugitive criminal alleged to have been convicted of an extradition crime"—Extradition Treaty with France, arts. I. and III.—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 10.

The applicant, a French subject, was convicted in France of robbery with violence—a crime specified in the Extradition Treaty between Great Britain and France—and sentenced to a term of imprisonment. While undergoing his sentence he broke out of prison and escaped to England. An order having been made by a police magistrate committing the applicant for extradition to France as having been convicted of the said crime, a rule for a writ of habeas corpus was applied for, the applicant contending that neither the Extradition Act, 1870, nor the Extradition Treaty with France applied to the case of a convict who broke out of prison, and that the offence of prison breach was not an extraditable offence:—

Held, refusing a rule, that the committal for extradition was right as the applicant was "a fugitive criminal alleged to have been convicted of an extradition crime" within s. 10 of the Extradition Act, 1870, and a person "convicted of a crime" within art. I. of the Extradition Treaty with France.

MOTION for a rule nisi for a writ of habeas corpus.

The applicant for the rule, Marcel Louis Albert Moser, was a French subject who in 1910 was convicted in France of the

1915

MOSER, *Ex parte.*

crime of robbery with violence and sentenced to imprisonment for four years. He appealed, and his sentence was reduced to three years' imprisonment. While undergoing his sentence he, in June, 1911, escaped from prison and went to Belgium, and thence to England, where he had worked since January, 1912. In September, 1914, the applicant called upon the French Consul in London and offered to return to France to fight as a soldier, provided an undertaking was given to him that he would not be required to serve the unexpired term of his sentence. The French Consul communicated with the French police authorities, who refused to give the undertaking asked for by the applicant and applied for his extradition. The applicant was accordingly brought before the magistrate at Bow Street Police Court to show cause why he should not be surrendered in pursuance of the Extradition Act, 1870, on the ground of his having been convicted of the crime of robbery with violence within the jurisdiction of the French Government; and as in the opinion of the magistrate no sufficient cause had been shown why the applicant should not be surrendered, an order committing him for extradition was made.

E. Abinger, for the applicant. The order of committal made by the magistrate was wrong. By art. I. of the Extradition Treaty with France, the high contracting parties engage to deliver up to each other persons "who are being proceeded against or who have been convicted of a crime," but the expression "convicted of a crime" cannot be taken literally, as it would include a person who has been convicted and has served his sentence; it is submitted that the phrase as used in art. I. refers to a person convicted in his absence as may happen under French law. It does not apply to such a case as this. Further, the second paragraph of s. 10 of the Extradition Act, 1870, which provides that "In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged," has

1915

MOSER, *Ex parte.*

no bearing upon this case, as the applicant was not a "fugitive criminal," but a convict who had escaped, and prison breach is not an extraditable offence.

AVORY J. I am of opinion that no rule should be granted in this case. The order of committal shows that the applicant has been committed with a view to his being surrendered in pursuance of the Extradition Act, 1870, on the ground that he has been convicted of the crime of robbery with violence. Mr. Abinger admits that the applicant was convicted of this crime, that he was sent to prison, and that he broke out and fled to this country, but he contends that the offence of prison breach is not one of the offences specifically mentioned in the Extradition Treaty with France or in the Extradition Act, 1870. The answer to that contention is, first, that the applicant is a "fugitive criminal" within the meaning of s. 10 of the Extradition Act, 1870. Clearly the applicant is a criminal who has not yet served his sentence, and I think it cannot be denied that he is a fugitive criminal. The second paragraph of s. 10 of the Extradition Act, 1870, clearly contemplates the case of a fugitive criminal alleged to have been convicted of an extradition crime, and in that event all that the magistrate has to consider is whether the evidence before him is such as would, according to the law of England, prove that the prisoner was convicted of such crime. It is not disputed that the magistrate had before him evidence such as would, according to the law of England, prove that the applicant was convicted of such crime. The case is clearly within s. 10. I also think it comes within the Extradition Treaty with France, because the applicant is a person who has been convicted of one of the crimes specified in the treaty. I therefore see no ground for saying that the magistrate has not properly exercised his jurisdiction.

ATKIN J. I agree. It appears to me that the treaty and the Act relate to two sets of circumstances; the first is where the fugitive criminal is suspected or accused of a crime, and the second is where the fugitive criminal has been convicted of a crime. There are provisions for dealing with both those cases,

provided that the crime of which the person is accused, or for which he has been convicted, is a crime specified in the treaty. In this case the applicant has been convicted of the crime of robbery with violence, a crime mentioned in the treaty, and he broke out of prison and came to this country. In those circumstances I think the applicant is a "fugitive criminal"; he is a fugitive criminal who has been convicted of an extradition crime, and it seems to me therefore that the committal order is right. Sect. 3, sub-s. 2, of the Extradition Act, 1870, would seem to show that the applicant could not be tried for prison breach. That sub-section provides that "A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to [His] Majesty's dominions, be detained"—that covers the case of a convicted criminal—"or tried in that foreign State for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded." The French Government is entitled to have the applicant extradited in respect of the crime for which he has been convicted.

Rule refused.

J. S. H.

May 13. Before Lord Reading C.J., Avory and Low JJ.,

E. Abinger again moved for a rule nisi for a writ of habeas corpus. He relied upon further materials contained in an affidavit made since the previous application, in which it was stated that the effect of the letters from the French Embassy, asking for the extradition of Moser, was that his extradition was demanded as "poursuivi pour vol," that is, prosecuted for robbery, and on a charge of robbery. He contended that the word "poursuivi" did not mean "convicted," but charged with or prosecuted for; and that the magistrate had made an order in respect of an offence for which the French Government had not demanded the extradition.

The COURT refused the application.

1915

MOSER, *Ex parte.*

LORD READING C.J. said: This application is made upon the ground that extradition has been requested for having committed the crime of robbery with violence. The whole point turns upon the meaning of the word "poursuivi." From the documents sent from France, which we have seen, it appears to be clear that in those documents the word means prosecuted to conviction for, and not merely charged with, the crime of robbery with violence. Then s. 10 of the Extradition Act, 1870, speaks of "a fugitive criminal alleged to have been convicted of an extradition crime," and provides that the magistrate may commit him for extradition. That obviously means a criminal who has been convicted and has not served his sentence. The warrant of commitment in this case shows that the applicant has been committed on the ground that he had been so convicted. This application therefore fails.

Solicitors for applicant: *Claude Lumley & Co.*

J. H. W.

1915

April 30; *May* 14.

PERKINS *v.* JEFFERY.

Criminal Law—Evidence—Indecent Exposure—Cross-Examination of Prisoner—Evidence of previous Acts—Admissibility.

The respondent was charged under s. 4 of the Vagrancy Act, 1824, with having on July 16, 1914, exposed his person in Small Heath Park, Birmingham, with intent to insult a certain female, Miss T. In her evidence Miss T. stated that at 7.30 A.M. on July 16 she saw the respondent in Small Heath Park, and that he exposed his person to her; she also said she had seen him in the early part of May, 1914. The respondent when arrested said, "They have made a mistake; they have got the wrong man." In giving evidence on his own behalf the respondent denied having been guilty of the offence, and in cross-examination he said, "I do not remember seeing her on first or second week in May, 1914"; he was then asked, also in cross-examination, "Do you deny exposing yourself to the same young lady in Small Heath Park in the first or second week in May last?" The respondent replied, "I do deny it." The justices ruled that this question should not have been put, on the ground that it was not relevant to the issue they had to determine and was contrary to the provisions of s. 1 of the Criminal Evidence Act, 1898. The solicitor for the prosecution intimated that to rebut the respondent's denial he desired to recall

Miss T. to prove that the respondent had been guilty of the same conduct to her at the same time and place on May 16, 1914; he also desired to call other witnesses to show that the respondent had been guilty of a systematic course of conduct by indecently exposing himself with intent to insult females on other occasions at the same place and about the same hour. The justices refused to hear such evidence :—

Held, that the question put to the respondent in cross-examination, which the justices ruled should not have been put, and the evidence tendered of Miss T. to show that the respondent had been guilty of the same conduct to her at the same place in May, 1914, were admissible and relevant for the purpose of showing that Miss T. was not mistaken in her identification; that what was done by the respondent was done wilfully and not accidentally, and that it was done to insult her; but that the evidence tendered of other witnesses was not admissible, unless and until the defence of accident or mistake, or an absence of intention to insult, was definitely put forward, and it appeared that the other occasions on which it was said that the respondent had indecently exposed himself were sufficiently proximate to the alleged offence to show a systematic course of conduct.

CASE stated by Birmingham justices.

On July 21, 1914, the appellant, George Perkins, who was a police constable, preferred a charge against the respondent Clarence Jeffery, under s. 4 of the Vagrancy Act, 1824 (1), for having on July 16, 1914, unlawfully, wilfully, openly, lewdly and obscenely exposed his person in a certain place of public resort, to wit, Small Heath Park, Birmingham, with intent then and there to insult a certain female named Kathleen Turnor.

At the hearing of the charge Miss Turnor, who was twenty years of age, gave evidence for the prosecution. She stated that on July 16 she was boating on the pool in Small Heath Park at 7.30 A.M. by herself; that she saw the respondent at the end of the pool, and that he exposed his private parts to her. She rowed to the end of the pool and complained to the boatman, who came up to the respondent and said, "Is this the man?" Miss Turnor said it was, upon which the respondent said, "I think

(1) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4: ". . . . every person wilfully, openly, lewdly and obscenely exposing his person in any street, road or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female . . . . shall be deemed a rogue and vagabond . . . . and it shall be lawful for any justice of the peace to commit such offender . . . . to the house of correction, there to be kept to hard labour for any term not exceeding three calendar months . . . . "

1915

PERKINS v. JEFFERY.

you have made a mistake there." She said, "I have not." She also said, "I had seen prisoner (the respondent) in early part of May, 1914." On this statement she was not cross-examined. The boatman in his evidence said that after receiving Miss Turnor's complaint he went up to the respondent and said, "Have you been exposing yourself?" to which he replied, "You have been making a mistake." The boatman also said that he had seen the respondent by the pool several times during May. When arrested by the appellant the respondent said, "They have made a mistake; they have got the wrong man."

The respondent gave evidence on his own behalf. He said that he had never been charged with any offence and he denied having been guilty of exposing himself to Miss Turnor on July 16, 1914. In cross-examination he said, "I do not remember seeing her on first or second week in May, 1914." He was then asked, also in cross-examination, the following question: "Do you deny exposing yourself to the same young lady in Small Heath Park in the first or second week in May last?" The respondent replied, "I do deny it," but acting under advice the justices ruled that this question should not have been put, on the ground that it was not relevant to the issue they had to determine and was contrary to the provisions of s. 1 of the Criminal Evidence Act, 1898.

The appellant's solicitor intimated that to rebut the respondent's denial as stated in the foregoing paragraph he desired to recall Miss Turnor to prove that the respondent had been guilty of the same conduct to her at the same place and at the same hour on May 16, 1914, and also that he desired to call other witnesses to show that the respondent had been guilty of a systematic course of conduct by indecently exposing himself with intent to insult females on other occasions at the same place and about the same hour. Acting on the advice given to them, the justices refused to hear such evidence on the charge preferred before them.

The justices determined and found as a fact that there was not sufficient evidence given by or on behalf of the appellant to satisfy them that the respondent was guilty of the offence charged, and they therefore discharged him.

If the justices were wrong in refusing to admit the question

put to the respondent in cross-examination, or the evidence proposed to be given in rebuttal, the case was to be remitted to them for rehearing; if they were right in refusing to admit the question and the proposed evidence in rebuttal, their decision was to stand.

W. N. Birkett, for the appellant. The justices were wrong in rejecting the evidence in question. Although not admissible for the purpose of showing that the respondent was a person of bad character or a person likely to have committed the particular offence, the evidence was admissible to rebut the defence of mistake or accident—*Reg.* v. *Francis* (1); *Makin* v. *Attorney-General for New South Wales* (2)—and to show a systematic course of conduct on the part of the respondent—*Rex* v. *Wyatt* (3); *Rex* v. *Bond* (4)—and to show the object with which he was at the place in question at the particular time: *Rex* v. *Ball* (5); *Rex* v. *Shellaker*. (6)

C. Doughty, for the respondent. In the cases cited on behalf of the appellant the evidence sought to be admitted was held admissible in order to negative mistake on the part of the prisoner. In this case there was no suggestion of mistake on the part of the respondent. His defence throughout was that the prosecution had arrested the wrong man; and in reality the purpose of the evidence tendered was to negative any mistake on the part of the prosecution as to the respondent's identity. For such a purpose the evidence is not admissible. If the respondent had admitted that he had in fact exposed his person on July 16, but had said that he did so by accident or for a natural purpose, the evidence might have been admissible to negative that defence, but no such defence was put forward by him; he denied that he had committed the act complained of, and in those circumstances the justices rightly excluded the evidence. If the question or the evidence is admissible in this case and can be asked or called before a defence of accident or mistake is set up, similar questions could be asked and similar evidence called in a case of larceny or any other crime. The defence only amounted

(1) (1874) L. R. 2 C. C. R. 128.
(2) [1894] A. C. 57.
(3) [1904] 1 K. B. 188.
(4) [1906] 2 K. B. 389.
(5) [1911] A. C. 47.
(6) [1914] 1 K. B. 414.

1915

PERKINS v. JEFFERY.

in this case to a mere denial of the charge. [He referred to *Rex* v. *Rodley*. (1)]

Cur. adv. vult.

May 14. The following judgment of the COURT (Lord Reading C.J., Avory and Sankey JJ.) was read by

AVORY J. The respondent was charged under s. 4 of the Vagrancy Act, 1824, with having exposed his person in a place of public resort with intent to insult a female named Kathleen Turnor on July 16, 1914.

The questions submitted to this Court on the special case stated by the justices are, first, whether the respondent giving evidence on his own behalf could be asked in cross-examination if he had exposed himself to the same young woman at the same place in the month of May, 1914; secondly, whether evidence was admissible on the part of the complainant that he had so exposed himself in the month of May; and, thirdly, whether evidence was admissible on the part of the complainant that the respondent had on other occasions indecently exposed himself with intent to insult females at the same place and about the same hour.

The justices refused to admit the question in cross-examination, or the other evidence, on the ground that it was not relevant to the issue and was contrary to the provisions of s. 1 of the Criminal Evidence Act, 1898.

With regard to the question in cross-examination it appears now, by the notes of the evidence which have been supplied on the restatement of the case, that the respondent giving evidence-in-chief put his character in issue, and the question, therefore, might have been admitted on that ground alone; but in view of a rehearing of the case it is necessary to consider whether this and the other evidence tendered was admissible as being relevant to the issue.

The Criminal Evidence Act, 1898, does not exclude any question in cross-examination which may tend to criminate the accused of the offence charged, nor any evidence which is admissible to show that he is guilty of the offence charged.

(1) [1913] 3 K. B. 468.

1915

PERKINS v. JEFFERY.

Upon the hearing of the charge in the present case the complainant had to prove, first, that the respondent had exposed himself; secondly, that he had done so wilfully and not accidentally; and, thirdly, that he had done it with intent to insult her. In our opinion the question in cross-examination and the evidence of the complainant directed to show that he had done the same thing at the same place and to the same woman were admissible and relevant to each of these issues for the purpose of showing that she was not mistaken in her identification; that it was done wilfully and not accidentally; and that it was done with intent to insult her. The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to any issue before the Court: see *Makin* v. *Attorney-General for New South Wales* (1) and *Reg.* v. *Ollis* (2) and the judgment of Channell J. (3) It is suggested that the defence raised in this case was one of identity, and that this was the only issue before the Court; but in our opinion the statement of the respondent when arrested, "They have made a mistake; they have got the wrong man," would not preclude him from raising the other defences that the act was not wilful, and not done with intent to insult the complainant; and it must be borne in mind that in criminal cases, and especially in those where the justices have summary jurisdiction, the admissibility of evidence has to be determined in reference to all the issues which have to be established by the prosecution, and frequently without any indication of the particular defence that is going to be set up.

In the present case we think the cross-examination did suggest a possible defence on the ground that the act was not wilful or with intent to insult a female.

With regard to the evidence tendered of other witnesses to show that the respondent had been guilty of a systematic course of conduct by indecently exposing himself with intent to insult females on other occasions at the same place and about the same hour, the question is more difficult. The dates of the other occasions are not before the Court, and unless it appeared clearly

(1) [1894] A. C. at p. 65. (2) [1900] 2 Q. B. 758.
(3) Ibid. at p. 781.

1915

PERKINS v. JEFFERY.

that the defence that the act was not done wilfully or with intent to insult a female was going to be relied upon, and that the other occasions were sufficiently proximate to the alleged offence to show a systematic course of conduct, we think the evidence should not be admitted. The case of *Rex* v. *Bond* (1), and particularly the judgment of Bray J. at p. 418, is an authority which would justify the admission of such evidence; see also Stephen's Digest of the Law of Evidence (8th ed.), art. 12: "When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant." But it is, we think, open to doubt whether evidence is admissible to prove a "system or course of conduct" unless it is relevant to negative accident or mistake, or to prove a particular intention: see the judgment of Lord Reading C.J. in *Rex* v. *Boyle and Merchant* (2), where he said this: "We think that the ground upon which such evidence is admissible is that it is relevant to the question of the real intent of the accused in doing the acts. Its object is to negative such a defence as mistake, or accident, or absence of criminal intent, and to prove the guilty mind which is the necessary ingredient of the offence charged. There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to show generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to show that he had a fraudulent or dishonest mind in the particular transaction the subject-matter of the charge then being investigated, which evidence is admissible. It has been laid down that there must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence to make such evidence admissible." Having regard to what was said in the House of Lords in the case of *Rex* v. *Christie* (3) as to the practice in a criminal case of guarding against the accused being prejudiced by evidence which though admissible would probably have a prejudicial influence on the minds of the jury

(1) [1906] 2 K. B. 389. (2) [1914] 3 K. B. 339, at p. 347.
(3) [1914] A. C. 545.

1915

PERKINS v. JEFFERY.

out of proportion to its true evidential value, we think that such evidence as to other occasions should not be admitted unless and until the defence of accident or mistake, or absence of intention to insult, is definitely put forward.

The case will be remitted to the justices for rehearing with this opinion of the Court.

Appeal allowed.

Solicitors for appellant: *Capron & Co., for J. E. Hill, Birmingham.*

Solicitors for respondent: *Judge & Priestley, for Philip Baker & Co., Birmingham.*

J. S. H.

[COURT OF CRIMINAL APPEAL.]

1915

May 17.

THE KING *v.* TAYLOR.

Criminal Law—Appeal—Case stated—Special Verdict of Guilty, but Insane—Right of Appeal—Crown Cases Act, 1848 (11 & 12 *Vict. c.* 78), *s.* 1—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3.

The Court of Criminal Appeal has no jurisdiction, either under the Criminal Appeal Act, 1907, or on a case stated under s. 1 of the Crown Cases Act, 1848, to entertain an appeal by a person against whom a special verdict has been found that he was guilty of the act charged against him but that he was insane at the time, inasmuch as he is not a convicted person within the above-mentioned statutes.

Felstead v. *Rex* [1914] A. C. 534 applied.

CASE stated by the deputy chairman of Worcestershire Quarter Sessions.

The prisoner was tried on April 12, 1915, on a charge of unlawfully wounding, when the jury found a special verdict of guilty, but insane.

Notice of appeal was given by the prisoner against the latter portion of this verdict, but as the decision in *Felstead* v. *Rex* (1) was considered to preclude him from appealing on any such ground, the deputy chairman thought it only fair to state a case

(1) [1914] A. C. 534.

1915

REX v. TAYLOR.

for the opinion of the Court on the procedure which was adopted at the trial.

During the past two years the prisoner had been a certified lunatic in the Powick Asylum, Worcestershire, and the assault which was the subject of the charge made against him took place whilst he was an inmate of that asylum.

Prior to the trial taking place Mr. Riley-Pearson was retained by the Court to look after the prisoner's interests. On the case coming on neither counsel for the prosecution nor for the defence raised any objection as to the competency of the prisoner to plead, but when the prisoner was called upon to plead he made rambling statements which made it difficult to determine with any certainty whether he intended to plead guilty or not guilty, and it was only after some little pressure from his counsel that he pleaded guilty.

Counsel for the prosecution suggested that under the peculiar circumstances of the case a verdict of not guilty should be entered and the case tried out with the view of ascertaining what the prisoner's mental condition was at the time the offence was committed. Mr. Riley-Pearson on the other hand contended that the Court had no right to disregard the plea of guilty, nor, in face of the plea, to raise the question of insanity during the trial.

The Court, with considerable doubt, acceded to the application of counsel for the prosecution, who was allowed to tender expert medical evidence as to the prisoner's state of mind on the day when the assault took place. The prisoner did not tender himself as a witness, nor was any evidence called on his behalf.

The medical evidence was that the prisoner knew right from wrong and knew the nature and quality of his act, but the witnesses were not agreed as to whether his mental disease was such as to render him incapable of controlling his actions.

The deputy chairman directed the jury that they could not find a verdict of guilty, but insane, unless they were of opinion that the prisoner was suffering from some uncontrollable impulse at the time the assault was committed; he stated also that he was doubtful whether such a finding was in accordance with law,

1915

REX v. TAYLOR.

but that his direction could, if necessary, be reviewed by the Court of Criminal Appeal.

The jury having found a verdict of guilty, but insane, the question on which the opinion of the Court was desired was whether on the above facts that verdict could properly be returned.

Dickens, *K.C.* (*Hon. R. W. Coventry* with him), for the Crown. There is a preliminary objection to the hearing of this appeal. The Court of Criminal Appeal has no jurisdiction to entertain an appeal by an accused person against whom a special verdict has been found that he was guilty of the act charged, but was insane at the time, inasmuch as he is not a convicted person: *Felstead* v. *Rex*. (1) The effect of that decision is not got rid of by having a case stated under s. 1 of the Crown Cases Act, 1848, as that section only empowers a judge to reserve any question of law for the consideration of the Court "when any person shall have been convicted of any treason, felony, or misdemeanour," and the present appellant has not been convicted.

[He was stopped.]

Riley-Pearson, for the appellant. The Court has jurisdiction to hear this appeal. The appellant said at quarter sessions that he was guilty; he was thereupon a person convicted on his own confession.

[AVORY J. The difficulty is that the record shows the special verdict.]

The record is wrong. The plea of guilty was never withdrawn. The fact that the appellant pleaded guilty was entered on the indictment, and that entry was not obliterated, although no doubt the plea of not guilty was thereafter added, as was also the special verdict found by the jury. Quarter sessions had no power, after the plea of guilty was tendered, to direct a plea of not guilty to be entered.

Dickens, *K.C.*, in reply. All that appears on the indictment is that in the first instance the appellant pleaded guilty; then that he pleaded not guilty; and there is the record that his trial was proceeded with and resulted in the special verdict which, as

(1) [1914] A. C. 534.

1915

REX v. TAYLOR.

was decided in *Felstead* v. *Rex* (1), amounted to a verdict of acquittal.

The judgment of the COURT (Lord Reading C.J., Avory and Low JJ.) was delivered by

LORD READING C.J. In this case a preliminary objection has been taken that no appeal lies to this Court. The appellant, on the advice of his counsel, pleaded guilty, but counsel for the Crown took the view that a plea of not guilty ought to be entered, and he asked the direction of the deputy chairman upon the point. The deputy chairman, knowing that the appellant had come from a lunatic asylum, thought that the proper course was to enter a plea of not guilty and allow the issue to be tried. We have the indictment before us and we have the case stated by the deputy chairman, and from these it appears that the jury came to the conclusion that the appellant committed the act complained of, but was insane at the time. Thereupon the deputy chairman made the only order he could make, namely, direct the appellant to be detained during His Majesty's pleasure. The effect of the jury's verdict which, prior to the decision of the House of Lords in *Felstead* v. *Rex* (1), might have been in doubt is, since that decision, no longer in doubt. It is now quite clear that that special verdict amounts to an acquittal of the person tried; and that being so he is not a person who has been convicted. The exact point arose in *Felstead* v. *Rex.* (1) There the question was whether upon such a verdict the accused could appeal to this Court, and the House of Lords held that he could not, as he was not a person who had been convicted within the meaning of s. 3 of the Criminal Appeal Act, 1907, which only gives a right of appeal to a person who has been convicted on indictment. Conscious of that difficulty it was thought that it might be met by having a case stated under the Crown Cases Act, 1848, but s. 1 of that Act, which provides that "when any person shall have been convicted of any treason, felony, or misdemeanour," the judge at the trial may reserve any question of law for the opinion of the Court, is, for this purpose, to the same effect as s. 3 of the Criminal Appeal Act, 1907, and according to the law laid down

(1) [1914] A. C. 534.

in *Felstead* v. *Rex* (1) this appellant has not been convicted and consequently has no right to come to this Court either on a case stated or by appeal in the ordinary way. Probably cases of this kind were not foreseen at the time the Criminal Appeal Act, 1907, was passed, but if any alteration of the law is to be effected it can only be by the Legislature; we have no jurisdiction to deal with the matter. As to the argument that once a plea of guilty has been tendered by the prisoner it is not open to the Court to direct a plea of not guilty to be entered, all we can say is that we must take the evidence which is before us and the case as it stands, from which it appears that the appellant pleaded guilty in the first instance, and as a result of the Court directing a plea of not guilty to be entered the case was proceeded with and the special verdict found by the jury. In those circumstances we must take it that the appellant was acquitted by the special verdict, and consequently no appeal lies to this Court.

Preliminary objection upheld.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for the Crown: *Director of Public Prosecutions.*

(1) [1914] A. C. 534.

J. S. H.

C. A.
1915
Jan. 13, 14.

[IN THE COURT OF APPEAL.]

FAIRBANKS *v.* THE FLORENCE COAL AND IRON COMPANY, LIMITED.

Mine—Coal Mine—Minimum Wage—Wages exceeding Minimum—Regularity and Efficiency—District Rules—Action for Wages—Condition Precedent—Coal Mines (Minimum Wage) Act, 1912 (2 *Geo.* 5, *c.* 2), *s.* 1.

By s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, it is made an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to the workman wages at not less than the minimum rate settled under the Act and applicable to the workman, unless it is certified in manner provided by the district rules that the workman is a person excluded under the district rules from the operation of the sub-section or that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions laid down by those rules with respect to regularity or efficiency of his work. By sub-s. 2 the district rules are to lay down conditions with respect to the regularity and efficiency of the work and to provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with the conditions, except as therein mentioned. The district rules are also to provide for the persons by whom and the mode in which any question whether a workman is one to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with those conditions has forfeited his right to wages at the minimum rate, is to be decided. District rules were duly made under this enactment.

A miner was employed at a rate of wages exceeding the minimum rate settled under the Act and consisting of the minimum rate increased by a sum per day payable through the action of a conciliation board and by a further sum payable by the custom of the district to miners in his position. He sued his employers in the county court to recover six days' wages. The employers claimed to make a deduction from the wages on the ground that the miner had failed to comply with the conditions with respect to regularity and efficiency laid down by the district rules. It was not disputed that if the case was within the Act the miner had no cause of action until the dispute had been decided as provided by the district rules:—

Held, that the case was within the Act, notwithstanding that the rate of wages exceeded the minimum rate as settled under the Act.

Decision of a Divisional Court (Bankes and Avory JJ.), reported [1914] 2 K. B. 461, affirmed.

Appeal from the decision of a Divisional Court (Bankes and Avory JJ.) (1) upon an appeal from the county court of Staffordshire holden at Longton.

(1) [1914] 2 K. B. 461.

The claim was by a collier for 2*l.* 6*s.* 6*d.*, being six days' wages at 7*s.* 9*d.* a day alleged to be due to him from the defendants, his employers. They claimed to be entitled to make a deduction from the wages on the ground that the plaintiff had failed to comply with the conditions as regards regularity and efficiency of work laid down by the joint district board, under s. 1, sub-s. 2, of the Coal Mines (Minimum Wage) Act, 1912. (1) They contended that in these circumstances the county court had no jurisdiction, but that the amount due to the plaintiff must be fixed according to the district rules. (2) They tendered

(1) Coal Mines (Minimum Wage) Act, 1912 (2 Geo. 5, c. 2), s. 1, sub-s. 1: "It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman, unless it is certified in manner provided by the district rules that the workman is a person excluded under the district rules from the operation of this provision, or that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions with respect to the regularity or efficiency of the work to be performed by workmen laid down by those rules; and any agreement for the payment of wages in so far as it is in contravention of this provision shall be void.

"For the purposes of this Act, the expression 'district rules' means rules made under the powers given by this Act by the joint district board."

Sub-s. 2: "The district rules . . . . shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen, and with respect to the time for which a workman is to be paid in the event of any interruption of work due to an emergency, and shall provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with conditions as to regularity and efficiency of work, except in cases where the failure to comply with the conditions is due to some cause over which he has no control.

"The district rules shall also make provision with respect to the persons by whom and the mode in which any question, whether any workman in the district is a workman to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with the conditions laid down by the rules has forfeited his right to wages at the minimum rate, is to be decided, and for a certificate being given of any such decision for the purposes of this section."

(2) The following rules of the North Staffordshire Joint District Board bear on the matter of the minimum wage:—

"1. For the purposes of s. 1, sub-s. 2, of the Act, there shall be local joint committees, consisting of two representatives of the employers

C. A. 1915

FAIRBANKS v. FLORENCE COAL AND IRON COMPANY, LIMITED.

the amount which they contended was justly due to the plaintiff, and which was less than the sum of six days' wages at the minimum rate settled under the Act. The plaintiff refused to accept the amount tendered.

The plaintiff was a buttocker, i.e., a collier working at a certain

---

and two representatives of the workmen (selected from time to time as occasion may arise from the joint district board by the president and vice-president), who in case they disagree shall call in a chairman, whose decision shall be final . . . ."

"4. A local joint committee shall, when reference is made to it, decide (*a*) whether a workman is one to whom the minimum rate is applicable, (*b*) whether the workman has complied with the conditions laid down by the rules, and (*c*) whether he has or has not forfeited his right to wages at the minimum rate."

"7. A workman who fails in any week to duly attend 80 per cent. of his available working days shall forfeit for that week the right to wages at the minimum rate (unless his attendance is prevented by illness or accident) and be paid at his existing contract rate.

"If any workman voluntarily ceases work, or leaves his working place before the proper time at the end of his shift, the proportion of the payment for the time so lost shall be deducted from the amount of his minimum wage for that shift.

"8. If a workman working at contract rates, in consequence of his own disregard of instructions, breach of colliery rules, or other wilful act or default is prevented from earning an amount equal to his minimum wage, he shall forfeit the right to the minimum wage until any defect arising from such act or default has been remedied."

"10. Where a contractor or a piece worker does not perform the amount of work which calculated at the agreed rates would amount to the minimum wage he shall not receive the minimum unless the deficiency is due to any cause for which he is not responsible, as for example, faults, bad roof, falls, water or other unusual conditions."

"12. In the case of a piece worker or a contractor employing other workmen, the owners shall only be responsible for the payment of the amount of wages at the minimum rates to the contractors and workmen employed by them, but this is without prejudice to the right of the workman to be paid by the contractor the agreed rates.

"13. In any case where causes of a temporary nature (as for example holding up new drifts, or driving of cruts or tunnels) reduce the amount payable to a contractor to a sum below the minimum rate, any sums paid to bring the earnings up to the minimum shall be treated as advances or payments on account, to be deducted from subsequent earnings when such earnings are in excess of the minimum. Provided always that such deductions shall not exceed the amount of the advances made and shall not during any week reduce the daily wage below the minimum rate.

"This rule shall not be held to cover any exceptional conditions such as faults or defects of a similar nature. . . . ."

part of the face of the mine and entitled by the custom of the colliery to an amount of 6*d.* a day more than other colliers. The wages in the district were fixed by the joint district board at 7*s.* a day for contracting colliers, and at 6*s.* 6*d.* per day for colliers other than contracting colliers. These rates had been increased to 7*s.* 3*d.* a day in either case by the conciliation board acting in the district. The plaintiff as a buttocker would be entitled to 6*d.* a day more than this, i.e., to 7*s.* 9*d.* a day, apart from the question raised by the defendants as to whether he was bound to comply and had complied with the conditions as to regularity and efficiency of work.

The plaintiff and another man had previously to the dispute been contracting colliers in a place known as Place No. 91. Some weeks before the dispute the plaintiff was asked to work at Place No. 92 and went to work there, his mate continuing for some time to work at Place No. 91. No special arrangement as to terms was made when the change took place. The minimum wage was not earned at Place No. 92. At the hearing in the county court several weekly bills were produced showing sums added each time by the employers called "consideration to make up wages." These sums were handed to the plaintiff to enable him to pay the men working under him the minimum wage and to pay himself as a buttocker the sum of 7*s.* 9*d.* a day. After stating certain facts the judgment of the county court judge proceeded as follows: "The minimum wage fixed for the district was six shillings and sixpence a day for miners; but by the action of the conciliation board wages paid in North Staffordshire are slightly higher in every case than this. It was argued for the plaintiff that, as he did not receive the minimum wage fixed by the board, but something higher, the wages board"—i.e., the joint district board—"has no jurisdiction, although in the present case the employers refused to pay even the minimum wage. It is admitted that if the plaintiff had been receiving the statutory minimum wage the dispute in this case must go before the wages board for them to determine whether or not the plaintiff had forfeited this wage by not complying with the conditions as to regularity and efficiency of work. I was of opinion that at the time the dispute arose the plaintiff was

C. A. 1915

FAIRBANKS v. FLORENCE COAL AND IRON COMPANY, LIMITED.

working by the day at the customary minimum wage for buttockers, and that the Act contemplated a minimum wage fixed by custom of the colliery somewhat higher than the statutory minimum wage, and intended that in such a case the wage is to be treated as the minimum wage for the purposes of the Act. I thought that the plaintiff was in reality being paid at the time the minimum statutory wage plus sixpence a day added by custom. If the minimum wage board lost its jurisdiction the moment the wages paid at a colliery are by custom even a fraction above those fixed by the minimum wage board as the minimum for the district, then in North Staffordshire it has lost already its jurisdiction to inquire into cases where the minimum wage has not been paid. I was of opinion that the Minimum Wage Act, 1912, intended such a dispute as existed in the present case to go before the wages board. I accordingly nonsuited the plaintiff."

On appeal to the Divisional Court, that Court held that the case was within the Minimum Wage Act, notwithstanding that the rate of wages exceeded the minimum rate as settled under the Act, and affirmed the decision of the county court judge.

The plaintiff appealed.

Langdon, K.C., and *W. Allen*, for the plaintiff. This contract was made between the parties independently of the Coal Mines (Minimum Wage) Act, 1912, and that Act therefore does not apply to it. The wages under the contract represent a sum arrived at by agreement between the parties without the necessity of falling back upon the Act. The wage paid at the colliery was something different from the minimum wage under the Act. *Randle* v. *Clay Cross Co.* (1), which at first sight appears to be in favour of the defendants, was overruled by *Barwell* v. *Newport Abercarn Coal Co.* (2) Further, the county court judge ought not to have nonsuited the plaintiff; he should have adjourned the case to enable the parties to go before the district board.

Greer, K.C., and *Jowitt*, for the defendants. The county court judge found as a fact that the plaintiff was employed at

(1) [1913] 3 K. B. 795.
(2) (1914) 138 L. T. Jo. 209; *The Times*, Dec. 16, 1914; since reported ante, p. 256.

the statutory minimum wage, but that by the custom of the colliery he was paid a small sum more; in the circumstances, therefore, the Act applies. If the argument for the plaintiff were right, the operation of the statute would be reduced to very few cases indeed. To get at the basis on which the extra 6*d.* or 9*d.* is based, the collier must first bring himself within the Act; you must have the statutory minimum wage before you can start at all.

The plaintiff is not entitled to take the second point; he never asked for an adjournment, but asked to be nonsuited.

Langdon, K.C., in reply.

BUCKLEY L.J. In my opinion this appeal fails. The appellant, a workman employed underground in a coal mine, sues his employers for 46*s.* 6*d.*, being six days at 7*s.* 9*d.* a day. He brought his action in the county court. The employers said: "You did not observe the regulations as to regularity and efficiency in your work, and you are not entitled to your minimum wage under the Act of Parliament." That is a matter which is not for the determination of the county court judge, but for the determination of the proper authority under the Act of Parliament in question, the Minimum Wage Act. The learned county court judge took that view—he dealt with the case in a way which I will mention presently—and thought that it was not for him to determine the matter. The appellant says that it was for him to determine the matter; and that it lay within his jurisdiction to determine the whole matter in dispute between the parties. In order to ascertain whether that is so, the first and vital step is to ascertain what were the conditions of the man's employment. That is a question of fact which the learned county court judge had to decide; and we are bound by his decision. We have two means of informing ourselves of what the learned county court judge found. One is the shorthand note of his judgment as delivered; the other is what I may call an analysis or résumé drawn up by the learned judge himself, and signed by the learned judge, which states what was his decision. From these two sources of information, the conclusion at which I arrive is that the learned county court judge found that the man was not

C. A. 1915

FAIRBANKS v. FLORENCE COAL AND IRON COMPANY, LIMITED.

Buckley L.J.

employed by the day, at a daily rate of wage, but that he was employed upon terms which I may describe as follows: Ascertain first the tonnage rate upon the amount of coal got, according to the prices attributed to it in the mine. Add to that a sufficient sum to make it up to the proper sum. Out of that sum the plaintiff is to be entitled to a figure to be arrived at as presently stated. For a contracting collier the statutory minimum is 7*s.* For one who is not it is 6*s.* 6*d.* The appellant says he is not, and that 6*s.* 6*d.* is the statutory minimum rate. I will assume that is so. It does not matter whether it is one or the other. I will assume it is 6*s.* 6*d.* To that the conciliation board added a further 9*d.*, making 7*s.* 3*d.* The bargain between the man and his employer found by the judge, I think, was: "You shall have 6*d.* more than the aggregate of those two sums. You shall have the statutory minimum rate, say 6*s.* 6*d.*, plus the conciliation board addition of 9*d.*, plus a further 6*d.* which we will give you, making 7*s.* 9*d.* in all. That is how your wages shall be arrived at." I look at the judgment as delivered, and the judgment as subsequently prepared and signed by the learned judge, to see whether I am right in saying that that in substance is what he found. From the judgment as delivered the relevant sentences are these. The learned county court judge, after mentioning that the plaintiff and those working with him had been employed at a certain other place, namely, at No. 91, as contracting colliers, and then had moved on to No. 92, another place, says this: "The question is on what conditions were they taken on in 92." This is the bargain now in question. "They were taken on, I think, as men working in the colliery with fluctuating wages which had to be by the, I think there is no better word can be used than, custom—whose wages had to be by the custom of the colliery made up to a certain sum." That is an expression which plainly means, I think, "made up" to an agreed sum from the figure ascertained by taking the tonnage rates. Then he says further on: "The way in which the wages of these miners is regulated is, of course, somewhat complicated. It is not the ordinary case of one man going to another and saying: 'I will work for you at so much per week.'" Then further down he says: "I have come to the conclusion that this was not an

agreed wage by contract, but that it was a custom in this colliery to make up, whilst the men were working as they did work, not as contractors—it was the custom in the collieries to make up what they did in fact earn to what might be described as the customary minimum wage of that colliery. If I am right in saying that the 7*s.* 9*d.* which existed as the payment for this class of men at this colliery can be correctly described as the customary minimum wage, then I think this case is within the jurisdiction of the committee." Then, quite at the end of the judgment, he says: "I find this is not a case of a wage expressly fixed between the contracting parties themselves by contract." It appears to me the learned judge by that language has expressed himself to the following effect. This is not an agreement per day at a contractual sum per day. It is an employment upon terms that that which is the result of a man's work shall be made up to a sum. Take the work first, and then make up the sum to a further figure. In the signed judgment he uses expressions which I agree, if I had not got his judgment as orally delivered, would have embarrassed me. He says at the end of his signed judgment: "I was of opinion that at the time the dispute arose plaintiff was working by the day at the customary minimum wage for 'buttockers.'" Then he says further down: "I thought the plaintiff was in reality being paid at the time the statutory minimum wage, plus 6*d.* a day added by custom." There is something on the previous page of the signed judgment which creates a difficulty as to that, because he says this: "The minimum wage was not earned at the place 92; and several weekly bills were produced showing the sums added each time by the employers, called 'consideration to make up wages.'" That is so. We have the deductions which were before the learned county court judge; and they are made up in this way. For the previous week, that ending July 13, after setting out the names of the men who are interested in the pay-sheet in question, there follows an account, and that account contains the coal got less dirt, rip and so on, rip slant and so on; bars so much; and then "add 65 per cent." to the aggregate of those figures. But that is all made up, of course, on the footing of work done. Then at the foot of it is added "consideration to

C. A. 1915

FAIRBANKS v. FLORENCE COAL AND IRON COMPANY, LIMITED.

Buckley L.J.

make wages 2*l.* 2*s.* 4*d.*," which means an addition to make up to the minimum wage. That was before the county court judge; and it was quite plainly a pay-sheet which showed that the system of payment was to ascertain what was the money earned by work, and then to add something to make up the payment. The week in question, that ending July 20, is made up in the same way; but in that case there is no "consideration to make up wages," because the dispute arose and the employer was saying: "You have not worked according to the conditions as to regularity and efficiency, and you are not entitled to your wages." That passage, therefore, in the first part of the judgment shows me that the learned county court judge was intending, that which I find from his judgment as orally delivered that he was intending, to find that the men were paid by work done plus an addition to bring it up to the agreed wage, namely, the statutory minimum wage, plus the conciliation board addition, plus 6*d.* Those sentences in the latter part of the judgment which I have read are not to be found in the oral judgment, in the sense in which you might understand them as saying that the man was employed by the day, in the sense that he was employed at a daily wage.

That being so, it appears to me that the present case, as found by the learned county court judge, is this: that this man was employed on the terms that he should be remunerated by receiving an aggregate sum, made up of three factors: first, the statutory minimum wage, say 6*s.* 6*d.*; second, the sum added by the conciliation board, 9*d.*; third, an arbitrary 6*d.*, which was added by agreement between the parties. Of those three factors the first, namely, the statutory minimum wage, is not a fixed sum. It is a fluctuating sum in the sense that under the provisions of the Act of Parliament it is liable to be forfeited altogether, or reduced by reason of circumstances mentioned in the Act of Parliament, namely, that the man does not observe the conditions as to regularity and efficiency of work. That first factor in the calculation is one the true amount of which cannot be ascertained by the county court judge, but must be ascertained by the tribunal created by the Act of Parliament. Consequently, the learned county court judge, being unable to

ascertain one item in the aggregate figure, could not, of course, ascertain the aggregate figure, that is to say, could not entertain the question of deciding what is due to the man.

Under those circumstances, what happened was this. Judgment was asked for, and judgment was refused, whereupon the plaintiff asked the learned county court judge to nonsuit him, intending, I suppose, to bring another action. No question was raised as between nonsuit and adjournment of the case. The learned judge nonsuited him. The result is that, even if it would have been the more correct course not to nonsuit but to adjourn, that question does not arise; because the plaintiff asked to be nonsuited and was nonsuited. The only difference that it makes is this. If the case had been adjourned, it could have come on again upon the same plaint; whereas, as there has been a nonsuit, there would have to be the issue of another plaint. I think there is no substance in that ground of objection. I think the order under appeal is right, and that this appeal must be dismissed.

KENNEDY L.J. I think there is considerable difficulty in this case; but in the result I take the same view as Buckley L.J. has expressed. The whole difficulty arises originally from the uncertainty of the inference—and it is an uncertainty which is not infrequent—which arises where the parties have not even orally attempted to fix the terms upon which the one as master and the other as workman are to go on dealing with each other. We have had, one may say, the judgment of the learned county court judge as he has given it to us in the way of a summary or statement of conclusions with some comments; and we have had, further, the shorthand note of what in fact were the terms of the judgment as delivered. I say this with profound respect to the learned county court judge, but as Buckley L.J. has said, there was a difficulty in some of the phraseology of the original in the note that came to us; and I think we have been assisted by the shorthand note of the actual expressions of the judge. The thing that we have to remember is that we are bound by the findings of fact of the learned judge. I agree, taking these documents as a whole, I think that he did mean distinctly to find

C. A. 1915

FAIRBANKS v. FLORENCE COAL AND IRON COMPANY, LIMITED.

Kennedy L.J.

this, which so to speak decides the whole matter, in my view, namely, that there was not an agreement to work in this mine between the plaintiffs and the defendants which was an agreement for payment of a fixed figure. If there had been an agreement the true meaning of which would be expressed, though not possibly in the most strictly legal terms, by saying that the miner was to assist in getting coal in this mine, and to be paid at the rate of 7*s.* 9*d.* a day, then when the dispute arose as to the payment of the particular week, the week ending July 20, the plaintiff would be entitled to say: "I am bringing an action on a common law contract for 7*s.* 9*d.* per day, and I claim to be paid at that rate." The mine owner would not have been entitled to say: "Yes, but I am entitled to make from that deductions according to the Coal Mines (Minimum Wage) Act of 1912," because under that Act there is a tribunal which can settle a dispute between employer and employed with regard to the right of the employed to have the minimum wage paid to him, in a case where the employer says on the other hand there is a right to deduction, because you have not complied with the conditions laid down by the rules, or have forfeited your right to wages for reasons which are stated in sub-s. 2 of s. 1 of that Act. In that case the plaintiff would have been entitled to succeed in this appeal. He had a fixed rate of payment, no reference to any minimum wage; no question therefore arising as to a minimum wage; but a claim which the master would have had to meet in the usual way in which such actions can be met. If it is a common law action, it would be met by showing that orders had been disobeyed and damage arising from that; or that there had been some idleness on the part of the man which had caused damage, which damage at any rate might properly be treated in reduction of the claim. It seems to me that the judgment has in effect found that, instead of it being that which could be described as an agreed rate of payment per day of 7*s.* 9*d.*, there was, as the basis of his payment, a reference to a right to receive the reward given by the Act, namely, the minimum rate of wages. The minimum rate of wage is one which, in a given case, may be reduced under the section of the enactment to which I have already referred, s. 1, sub-s. 2. The county court judge has

found in terms, and that seems to me decisive, that the true agreement that ought to be inferred from what took place was that for this week ending July 20 he was working in the colliery with fluctuating wages which had to be, by the custom of the colliery, made up to a certain sum. That custom of the colliery involved a minimum wage. The minimum wage in itself is what is described by the word fluctuating—one which is fixed, subject to the power to have it reduced or even forfeited in a proper case; and that it is a proper case for such reduction or not has to be decided by a particular tribunal which is not the county court. If that is so, you have got a contract for payment according to first a minimum wage which will fluctuate, because the term "minimum wage" introduces the Coal Mines (Minimum Wage) Act, 1912. To that, of course, is added what is called a customary addition; and, as I understand, a further addition of what has been given by the conciliation board. But you have got an element of payment which the employer has a right to say for this particular week could only be assessed in a particular way. To my mind, it is not sufficient at all for the plaintiff to say that "It is a composite sum resulting in a total, assuming that the minimum wage in my particular case is to be taken at what it is taken in a colliery by a man who fully discharges his duty, and is entitled to it"; but it is a composite wage in respect of one item of which it is essential to be decided in this case—where there is a dispute as to whether the workman has been doing his duty—by the tribunal which will decide this question, if it is brought before it, that the man is entitled to it.

Upon that state of facts I am clearly of opinion myself, as I judge was the opinion of the Court in the case of *Barwell* v. *Newport Abercarn Coal Co.* (1) which was referred to, that the right course for the county court judge, if he comes to that conclusion, is for him to adjourn the case in order that that item may be settled. The Court there left open, and I leave open, by whom the certificate, which is the way in which the tribunal so to speak promulgates its decision, should be produced, and upon whom the burden lies of producing it. I do not wish to say

(1) 138 L. T. Jo. 209; *The Times*, Dec. 16, 1914; since reported ante, p. 256.

C. A. 1915

FAIRBANKS v. FLORENCE COAL AND IRON COMPANY, LIMITED.

Kennedy L.J.

anything about that. It was left undecided before, and I propose to leave it undecided now. It is not, perhaps, a matter of much practical importance, but the learned county court judge in this case has acted in this way. I do not mean to say that he was not practically obliged to take the course he did by the action of the parties, who I suppose desired to have this one point settled as to whether or not there was a necessity, in order to arrive at the final decision, of having the question determined as to whether there was to be any, and if so what, deduction from the minimum wage or weekly payment. Desiring much more to have that decided than to get a decision as to whether any part of the 2*l.* odd claimed was recoverable, the plaintiff asked that the matter should be dealt with by a nonsuit. If that is so, the learned judge, as he could not decide except in favour of the defendants as things stood, was put in a position of doing what he has done. But I do desire to repeat what is expressed in the report before me in the decision of this Court previously, that the proper course is, supposing he is left to himself, on finding that it is necessary that, in order to find the true amount of wages, they should be ascertained by reference to the minimum wage and by reference to the tribunal which settles how far that minimum wage is to be paid on a particular occasion, to say, whatever the parties may say, "I adjourn this case for the purpose of the parties coming to a conclusion," remembering, of course, if nothing further is done, to give a decision.

PICKFORD L.J. I am of the same opinion; and I have very little indeed to add. The contention of the appellant, as I understand it, is that the Minimum Wage Act has no application in this case at all, because the plaintiff was suing upon an express agreement for a wage that was not the statutory minimum wage, but was something else; and that, therefore, as he was suing upon a contract of that sort, the implication that he must be paid not less than the statutory minimum wage did not arise, and had nothing to do with the case, and therefore the Minimum Wage Act did not apply. It seems to me the first answer to that is that the judge has distinctly found as a fact, and found in my opinion quite rightly, although I have nothing to do with whether the

finding is right or wrong, that there was no agreement at all. The man went there to work under such terms of remuneration as would arise from the fact of his going to work at that colliery. There was a custom in that colliery that there should be paid to the men, in addition to the minimum wage, two sums, in the case of this particular man, of 9*d.* and 6*d.* That was, therefore, what he would expect to receive. But the first thing that has to be arrived at in order to get that is what is the minimum wage. There was no agreement to pay him the minimum wage. The agreement, if there was any agreement, was to pay something more, and it would be in addition to the minimum wage. I think that the learned county court judge was quite right in his finding, which is in his judgment as settled by himself: "I thought the plaintiff was in reality being paid at the time the statutory minimum wage, plus 6*d.* a day added by custom." It is really 9*d.* plus 6*d.* added by custom. I do not know whether in that case he meant to say that the statutory minimum wage was what was fixed by the board plus 9*d.* If he did, I think probably he was wrong. But I think what the plaintiff really was paid was the statutory minimum wage plus 9*d.*, plus 6*d.*; and that the custom of the colliery under which he was entitled to it was one which added to the minimum wage those two sums.

Under those circumstances, you cannot get on a step in ascertaining his wages until you ascertain his minimum wage. That is the first thing you must do. It seems to me, therefore, under those circumstances, the minimum wage must obviously apply to the matter; and that the provisions as to going before this tribunal where there is a dispute must apply also. I think, therefore, the learned county court judge was perfectly right in that.

I may say that I agree that by this dispute arising the county court judge's jurisdiction was not ousted. I think he had jurisdiction; but I think, as was said in the previous case before this Court, as soon as it appears to him that there is a dispute between the parties which has to go to the special tribunal set up by the Act, then he must perforce hold his hand; he cannot do anything until that dispute has been decided. But I do not think, as his jurisdiction is not ousted,

C. A. 1915

FAIRBANKS v. FLORENCE COAL AND IRON COMPANY, LIMITED.

Pickford L.J.

that the right course is to give judgment or to nonsuit. I think the right course is to stay the action; and, as I had occasion to say in the last case before the Court, I think in most cases, unless there is something to make them do otherwise, if the plaintiff had brought a premature action, the judge would stay it, and would make the plaintiff pay the costs of having brought a premature action. But strictly speaking, I think he should stay the action or adjourn the case—I put it either one way or the other—and should not give judgment for the defendant and should not nonsuit. In this case, however, it really was the act of the plaintiff by which a nonsuit was entered. He did not ask for a stay. He really asked that a nonsuit should be entered. Therefore there is no grievance of that kind in this case. There is really no substance in it, except this, that in order to get his wages there will be the expense of a new plaint. That is the only difference between staying the action and a nonsuit; and as it was done at the request of the plaintiff, I do not think that point can be taken at all.

Appeal dismissed.

Solicitors for plaintiff: *Stow, Preston & Lyttelton, for Hollinshead & Moody, Tunstall.*

Solicitor for defendants: *M. A. Orgill, for W. H. Breton, Longton.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1915
Feb. 16.

PYMAN STEAMSHIP COMPANY *v.* HULL AND BARNSLEY RAILWAY COMPANY.

Dock—Contract for Use of—Unfitness of Equipment of Dock—Damage to Ship —Exemption Clause in General Words—Liability of Dock Owner.

The defendants were the owners of a graving dock, which the plaintiffs' ship used under a contract for reward. By the terms of the contract the defendants supplied the necessary blocks for supporting the vessel while in the dock. The contract also provided that "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel . . . . whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising." Owing to the negligence of the defendants the blocks upon which the keel of the plaintiffs' ship rested were uneven in height, whereby she suffered damage:—

Held, that, even assuming that the obligation of the defendants to provide blocks and block caps was a fundamental obligation of the contract, the language of the exemption clause was such that it must be read as covering failure to perform any such obligation and as covering negligence arising from want of care in the performance of such obligation, and that consequently the defendants were exempted from liability.

Decision of Bailhache J. affirmed.

Appeal from the decision of Bailhache J. (1)

The plaintiffs were the owners of the steamship *Marmion*, and the defendants were the owners of a graving dock at Hull. In February, 1913, the *Marmion* was received by the defendants into their graving dock for reward upon the terms of an agreement in writing.

By the terms of the agreement, clauses 11 and 12, the defendants were to provide blocks and block caps. The charge for the blocks, which were made of iron, was included in the charge for the use of the dock. For the block caps, which were of soft wood in order to give to the pressure of the vessel's keel, and which required frequent removal, a separate charge was made. The agreement also provided by clause 9 as follows: "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for

(1) [1914] 2 K. B. 788.

C. A. 1915

PYMAN STEAMSHIP COMPANY v. HULL AND BARNSLEY RAILWAY.

any accident or damage to a vessel going into, or out of, or whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising." Owing to the neglect of the defendants to exercise due care in placing the blocks and caps in position at the bottom of the dock, the tops of the blocks on which the *Marmion* rested were uneven in height, whereby a strain was caused to the vessel's frame and her forefoot plates were set up and damaged. The defendants by way of defence relied upon the above-mentioned clause as exempting them from liability.

Bailhache J. held that although general words in a contract exempting the contractor from liability for damage caused by a breach of his contractual duty may be inoperative to excuse him where the duty is a prima facie absolute duty, such as that of a shipowner under a contract of affreightment to provide a seaworthy ship, it was otherwise where the contractor's obligation was only to exercise due care; that the prima facie duty of the defendants was not an absolute duty to provide blocks reasonably fit for the purpose for which they were to be used, but only a duty to take care that they were reasonably fit; and that the exemption clause, although expressed in general words, operated to exempt them from liability for the damage resulting from their unfitness.

The plaintiffs appealed.

Adair Roche, K.C., and *Raeburn*, for the plaintiffs. There are three possible obligations on the part of the defendants: (1.) to provide fit and proper blocks; (2.) to take reasonable care that the blocks shall be fit and proper; or (3.) to take all possible care that they shall be so. All alike are absolute and fundamental obligations and can only be waived by express, and not by general, words. The fitness of the dock for the purpose for which it is being used is an underlying obligation at the root of the whole matter. The contract is one to provide certain appurtenances essential to the user of a dock. [They cited *Travers & Sons* v. *Cooper* (1); *Steel* v. *State Line Steamship Co.* (2); *Hyman* v. *Nye* (3); *The West Cock* (4); *Randall* v. *Newson* (5); *The*

(1) [1915] 1 K. B. 73.
(2) (1877) 3 App. Cas. 72.
(3) (1881) 6 Q. B. D. 685.
(4) [1911] P. 23, 208.
(5) (1877) 2 Q. B. D. 102.

Forfarshire (1); *Tattersall* v. *National Steamship Co.* (2); *Morris* v. *Oceanic Steamship Co.* (3); *Hart* v. *Pennsylvania Railroad Co.* (4); *Chartered Bank of India* v. *British India Steam Navigation Co.* (5); *Mersey Docks* v. *Gibbs* (6); *Bede Steamship Co.* v. *River Wear Commissioners* (7); *Nelson Line* v. *James Nelson & Sons.* (8)]

Maurice Hill, K.C., and *Birt* (vice *Moss Blundell*, serving with His Majesty's Forces), for the defendants, were not called upon to argue.

LORD READING C.J. This is an appeal by the plaintiffs from the judgment of Bailhache J., who tried the case without a jury, and gave judgment for the defendants. The plaintiffs are steamship owners, and the defendants are a railway company who also carry on business as owners of dry docks. The question in this case relates to their obligation in the capacity of dry dock owners.

The steamship *Marmion* owned by the plaintiff company entered the defendants' dry dock, and in consequence of the sets of blocks which were provided for the ship to rest upon in the dry dock not having been evenly placed, or having been uneven in the way in which they were located by those responsible for the working of the dock, damage was caused to the ship's bottom. The amount of that damage measured in money has been estimated by the learned judge at 284*l.*

The question upon which the case has turned is whether or not clause 9 of the regulations, which are incorporated in the contract between the plaintiffs and the defendants, excludes the defendants from liability for negligence in the performance of their contract to provide blocks, or for failure to provide blocks as fit and proper as care and skill could possibly make them, or blocks as fit and proper as care and skill reasonably could make them. No question arises upon this appeal as to the negligence of the defendants, or as to their failure to perform the obligation to provide fit and proper blocks, or to use the blocks in a fit and proper way so as to support the vessel without

(1) [1908] P. 339.
(2) (1884) 12 Q. B. D. 297.
(3) (1900) 16 Times L. R. 533.
(4) (1884) 112 U. S. Rep. 331.
(5) [1909] A. C. 369.
(6) (1866) L. R. 1 H. L. 93.
(7) [1907] 1 K. B. 310.
(8) [1908] A. C. 16.

C. A. 1915

PYMAN STEAMSHIP COMPANY v. HULL AND BARNSLEY RAILWAY.

Lord Reading C.J.

causing it damage. The learned judge has found that there was such negligence or failure to perform, and that finding of fact has not been challenged. But the learned judge exempted the defendants from liability and gave judgment in their favour because he felt bound to give effect to his interpretation and his construction of clause 9 of the regulations, and everything in this appeal turns upon the meaning to be attributed to the words of this clause 9.

Now the contract between the parties is for the use of the defendants' graving dock by the steamer *Marmion*, and the plaintiffs further accept, agree, and undertake to act in conformity with the company's graving dock regulations in force in respect of such user of the dock as per printed copy thereof forming part of this agreement, and engage prior to the vessel leaving the company's dock to pay the graving dock rent, pumping and user of block caps at the following rates. Then follow certain rates provided for the pumping, for the rent, and for the use of the block caps. The regulations which formed part of the contract are "The company's graving dock must be used subject to their regulations and to the following conditions." Then clause 9 runs as follows: "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into, or out of, or whilst in the graving docks whatever may be the nature of such accident or damage or howsoever arising; nor for loss occasioned by delay in getting vessels into or out of the dock; nor shall the company be liable for any injury to persons employed at vessels using the graving dock." Looking at the language of this clause, and giving it the ordinary significance, the words undoubtedly are wide enough to cover an exemption to the dock owners from all liability arising from the user of the graving dock. I think that when one speaks of the user of the graving dock with all its appurtenances for use as a graving dock, one means the graving dock with block caps, with pumps, with horizontal shores, with trestles, and with staging planks, which are all requisites of the user of the graving dock. The words used are in my opinion sufficiently wide to cover this case. The owner of a vessel using the dock must do so

at his own risk. Then the company are not to be responsible for any accident or damage whatever may be the nature of the accident or damage or howsoever arising. With reference to those last words "or howsoever arising" there has been some difficulty in arriving at the true view and in determining whether those words are to be construed as meaning "arising from any cause whatever," and whether they would be sufficient to relieve the contractor from liability caused by any negligence. It is sufficient for the purpose of this case to say that, although the point is raised before us as to the meaning of those words for the purpose of saving it should it be thought desirable to raise it elsewhere, the decision in *Travers & Sons* v. *Cooper* (1) is binding upon this Court, and therefore we should be bound to hold, and do hold, that those words must be construed as having the widest possible application.

Counsel for the plaintiff says, notwithstanding that he must admit for the purpose of this appeal that *Travers & Sons* v. *Cooper* (1) binds this Court, we should come to the conclusion, looking at the contract as a whole, bearing in mind its nature, its terms, and, he adds also, the sequence of clauses, that this clause was intended to have only a limited operation and that full effect could be given to the words of the agreement, and the language used in the clause, if we so construed it as to limit its operation to accident or damage to the vessel once in the graving dock and to liability for anything that might occur in the graving dock, but that it should not apply to the obligation imposed upon the dock owner to provide proper block caps for use in the dock. He says it is not necessary that the language should be so construed and that in previous decisions to which our attention has been called the Courts have construed, not these words, but similar words, in a limited sense, and that therefore we should do the same in this case.

The argument addressed to us was that this obligation to provide block caps was, in the language that has been used for the purpose of the discussion in the cases, a fundamental obligation of the contract. Sometimes it is said it is a primary object of the contract, or it is one of the initial obligations of the

(1) [1915] 1 K. B. 73.

C. A. 1915

PYMAN STEAMSHIP COMPANY v. HULL AND BARNSLEY RAILWAY.

Lord Reading C.J.

contract. I do not propose in deciding this case to discuss the exact meaning to be given to those expressions because it does not arise in this case for our decision. It seems to me that, assuming, as I will for the purpose of the argument, that this obligation to provide blocks and block caps is a fundamental or initial obligation of the contract, the language used in clause 9 is such that we must read it as covering failure to perform any such obligation and covering negligence arising from a want of care in the performance of such obligation. Looking at the clause from the various points of view that have been put forward to us by Mr. Roche and Mr. Raeburn, it seems to me that inevitably one must arrive at the conclusion that it was intended by the parties when they entered into this contract that the graving dock should be used with all its appurtenances, but that the user should be at the shipowner's risk. He was to make certain payments for the use of it and for the use of the blocks and other appurtenances, but in no case was he to have any claim against the owners of the dock for any accident or damage which might be caused to this vessel.

That seems to me to dispose entirely of the case and to make it unnecessary, and as it is unnecessary I do not think it would be useful, to discuss the various authorities to which our attention has been called. In these cases there has been considerable difficulty in reconciling all the authorities upon the meaning of clauses in contracts of this description. In truth those decisions turned upon the actual words of the clause. The principle which is to be deduced from them is, I think, as Mr. Roche rightly contended, that it may be that by the language employed and the subject-matter of the contract you are able to find that the clause was intended by the parties to be read only in the limited sense, and that when you have an obligation, such as, for example, the warranty of seaworthiness in a ship, and a contract of carriage or affreightment is entered into, you must find from the language of the contract words which indicate that it was intended to exempt the shipowner from liability for breach of that warranty, and that you would not ordinarily read into words of general exemption an extension of the exemption to such an obligation as that. But even so it is quite plain that in law the language used

may be sufficient to exclude the shipowner even from such an obligation. It may be by express words; it may be by necessary implication to be gathered from the language which has been used in the contract; but in any event you must find in the contract words which would justify the exemption of the shipowner for a breach of that obligation, and unless you do find them quite clearly the Courts have said that he is to be held liable.

It was further argued that, because this exemption clause is to be found in clause 9 of the regulations and the provisions with regard to the blocks are to be found in clauses 11 and 12 of the regulations, therefore we are to infer that the provisions as to the blocks were not included in the exemption in clause 9, but that we must read that exemption as applying only to the obligations which preceded clause 9. I think it impossible to give effect to that argument. The clauses must succeed each other. If there is to be more than the one clause there must be some order, and it is impossible to say because of the numbers that are given to the clauses, or because one clause follows another, that therefore you are to reject the meaning which you would otherwise give to the words. It always seems to me to come back to this: that everything must depend upon the meaning to be given to the words of clause 9, and if they have the wide application which I think they must have, having regard to the language used in the clause, then it must follow that, whatever the position in which we may find the clause, the dock owners are exempted from this liability. Therefore, in my judgment, though perhaps not for the same reasons, I agree with the decision of Bailhache J. and think that this appeal must be dismissed.

SWINFEN EADY L.J. In this case the plaintiffs' ship was injured and suffered damage in the defendants' graving dock. It appears that the tops of the blocks on which the ship *Marmion* rested were uneven in height, and when, after the water was let out of the dock, the ship took the ground, it rested unevenly on those blocks, whereby the frame sustained some strain and the forward plates were set up and damaged; and in consequence of that the ship sustained damage to the extent of some 284*l*. The question which arises in this action is whether the

C. A. 1915

PYMAN STEAMSHIP COMPANY v. HULL AND BARNSLEY RAILWAY.

Swinfen Eady L.J.

defendants, the dock company, are liable for the amount of that damage.

The ship entered the graving dock under the terms of a contract in writing, and in my opinion the rights of the parties depend upon the true construction of the contract. There is no doubt that the vessel sustained this damage whilst in the graving dock. Clause 9 of the contract provides that "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into, or out of, or whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising." Prima facie the language of that clause covers the events that have happened here. The ship sustained damage whilst in the graving dock, and then the provision is that whatever the nature of the accident or damage or howsoever arising the dock company are not to be liable, and that the owner of the vessel is to use the dock at his own risk. But then it is said, although those are general words of wide import, they are not to be construed in this case so as to exclude the liability of the dock owner for damage because the damage arose in consequence of a neglect of the defendants to provide proper block caps, and that ought to have been done before the vessel entered the dock, and that there was a fundamental obligation, an obligation which went to the whole root of the contract, to provide block caps in proper position on which the vessel could safely take the ground. It was contended that the present case was like the cases of unseaworthiness where the obligation of the shipowner is to provide a ship that shall be seaworthy; and reliance was placed upon cases which have arisen with regard to ships, where it has been held that the obligation of the shipowner is such that the exemption from liability for damage by particular clauses in the contract extends only to damage that shall arise from occurrences happening after the voyage has commenced and not to damage arising from the unseaworthy condition of the ship which the shipowner supplied. For instance, one of the cases cited, *The West Cock* (1), was a case

(1) [1911] P. 23, 208.

of towing, and there it was held that the special conditions of exemption for damage related only to defects occurring after the commencement of the voyage and not to a pre-existing defect in the tug. Similarly, *Tattersall* v. *National Steamship Co.* (1) was a case where cattle caught foot and mouth disease from being placed in an infected ship which was not seaworthy for the purpose of carriage of cattle. At the commencement of the voyage the ship was unfit for the purpose, and the terms of the contract relied upon only related to the carriage of the goods upon the voyage, and the damage arose from the unseaworthy condition of the ship before the commencement of the voyage. Cases of that kind were relied upon in support of the argument in the present case. It seems to me they have no application to it. Here the contract was for the use of a particular dock which is described in the contract. The shipowner was to use that dock at his own risk, and damage from whatever cause arising while the vessel was in that dock, in my opinion, is covered by clause 9, and the dock owner is exempted from liability. It is not a case of whether the shipowner has or has not to pay for block caps not provided in accordance with the contract; it is not that case at all. It is a case whether the dock company is liable for the damage to the ship by reason of not providing block caps which were suitable and of the requisite proper height. In my opinion the exemption from damage is comprised in and entirely covered by clause 9, and on that ground the plaintiffs are not entitled to recover against the owners of the dock.

BRAY J. I am of the same opinion. What we have to do here is to construe clause 9, having reference to the remaining clauses of the contract. We have had considerable argument as to what is a fundamental obligation, and as to whether that includes cases where the liability is absolute, or where the liability is only to use reasonable care or all possible care. I think it is unnecessary to go into those considerations. I will assume for the moment here that there was as to the graving dock and as to the blocks the duty, if you like the absolute duty, to provide a fit

(1) 12 Q. B. D. 297.

C. A. 1915

PYMAN STEAMSHIP COMPANY v. HULL AND BARNSLEY RAILWAY.

Bray J.

dock and proper block caps put in proper position. I do not say that is the construction of the contract, but for the purpose of this case I am willing to assume it. I should like to guard myself especially against saying that there was any absolute contract to provide a fit dock here. There was a warranty of some kind. For the purpose of this case I assume it was as wide as possible. Then the question which remains is this: whether clause 9 is wide enough to exempt the defendants from a breach of contract in respect of that liability. It begins in these words: "The owner of a vessel using the graving dock must do so at his own risk." The words "owner's risk" and the meaning of those words are now well known, particularly in the contracts of railway companies. Railway companies in carrying goods are under certain obligations under the Railway and Canal Traffic Act, and they have to give a choice of two rates. One rate is called the ordinary rate, and the other is called the "owner's risk rate"; and the owner's risk rate covers what is meant by "owner's risk." The clause means what it says. It begins with those words, and then it follows explaining the meaning of those words and making sure that they are to include every possible damage: "any accident or damage to a vessel going into, or out of, or whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising." It is difficult to use wider words than those, and although undoubtedly we must see that the construction that we are proposing to put upon this clause is a clear construction, because ambiguous words are not sufficient and they must be clear words exempting from a liability which would otherwise enure, yet it seems to me these words are quite clear so far as regards the graving dock. Now it is quite true that we must read the words "graving dock" as meaning something more than the dock itself in order to exempt the company here. I think the remaining words of the section are sufficient to show that, because it is "any accident or damage" following the words that I have read. There is clause 13, which says: "The owner of any vessel using the graving dock will be held responsible to the company should any person employed in connection with the vessel cut, destroy, or injure the walls, floor, or any of the blocks, machines, pitch boilers, cranes, tackle, or other

appendages to the graving dock." In my opinion the words "graving dock" in clause 9 include the graving dock and all its appendages. I do not think it is material to notice the exact position of these clauses. I cannot think that it could have been the intention of the parties that the defendants should be exempted from all liability for any defect in the dock in carrying on the business of the dock, although they are exempt from that liability with regard to the dock, and yet be liable in respect of such small things as these block caps.

In my opinion the decision of Bailhache J. was right.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Davenport, Cunliffe & Blake, for Moss, Lowe & Co., Hull.*

W. J. B.

[IN THE COURT OF APPEAL.]

HEWITT BROTHERS *v.* WILSON.

Marine Insurance—Concealment of Material Fact—Innocent Mistake as to Materiality—"Held covered" Clause—Effect of—"Interest insured."

A clause in a policy of marine insurance provided that "in the event of any incorrect definition of the interest insured it is agreed to hold the assured covered at a premium (if any) to be arranged":—

Held, that "interest insured" must be taken to mean "subject-matter insured"; and that the fact that the assured knew that the subject-matter insured was incorrectly defined did not deprive him of the benefit of the clause if he honestly believed that the correct definition was not a matter which it was material for the underwriters to know.

Decision of Bailhache J. [1914] 3 K. B. 1131 affirmed.

APPEAL from a decision of Bailhache J. (1)

By a policy of marine insurance subscribed by the defendants the plaintiffs insured four cases of printing machinery on the ships *Gulf of Suez* and *Orchis* on a voyage from London to Malta against

(1) [1914] 3 K. B. 1131.

C. A. 1915

HEWITT BROTHERS v. WILSON.

ordinary marine perils including risk of breakage. The policy provided that "In the event of claim for particular average or loss or injury to interest underwriters only to be liable for cost of replacing the parts lost or injured and all charges incidental thereto." It also contained the following clause: "In the event of deviation being made from the voyage hereby insured or of any incorrect definition of the interest insured it is agreed to hold the assured covered at a premium (if any) to be arranged." During the voyage a portion of the machinery was damaged by breakage. The action was to recover the amount of the loss so sustained.

The defence was that the plaintiffs had, when effecting the policy, omitted to disclose a material circumstance, namely, that the machinery was second-hand. There was evidence that the difficulty and cost of replacing lost or injured parts of machines were greater where the machines were second-hand and possibly out of date than where they were new. Evidence was also called by the plaintiffs to prove that it was unusual when insuring machinery on shipment to disclose whether it was new or old. The defendants had been in the habit of insuring different classes of machinery at one uniform rate.

Bailhache J. held that the plaintiffs were, under the circumstances, protected from the consequences of the misdescription by the "held covered" clause, and were entitled to recover subject to a premium to be arranged.

The defendants appealed.

Compston, K.C., and *Mackinnon, K.C.*, for the appellants. There has been concealment of a material circumstance in this case sufficient under the provisions of s. 18 of the Marine Insurance Act, 1906, to enable the insurer to avoid the policy. But, even if that is not so, the words "any incorrect definition of the interest insured" in the "held covered" clause apply to the insurable interest of the assured and not to the subject-matter insured. "Interest" is a well-known term in mercantile law and under the Marine Insurance Act, 1906, means insurable interest (see ss. 5 and 6), and does not mean subject-matter, and there may be an injury or a loss to the subject-matter without

there being an injury or a loss to the interest insured: *Allison* v. *Bristol Marine Insurance Co.* (1); *Anderson* v. *Morice.* (2)

Assuming, however, that the "held covered" clause does apply to the subject-matter, then the appellants say that "incorrect definition" would not cover non-disclosure of a material fact which materially altered the risk. *Maritime Insurance Co.* v. *Stearns* (3) is an analogous case. The respondents cannot say that their misdescription of the machinery was unintentional inasmuch as it was their deliberate and habitual policy not to describe second-hand machinery as such. The appellants rely on s. 17 as well as s. 18 of the Act, reading "good faith" as not connoting any idea of honesty or dishonesty: *Laing* v. *Union Marine Insurance Co.* (4); *Carter* v. *Boehm.* (5) There was no proof in this case that the loss occurred through any of the perils insured against or while covered by the risk.

Langdon, K.C., and *H. Dobb*, for the respondents. The only question is whether the true construction of the clause is such as to prevent the operation of the ordinary implications of law. There was a clear misdescription of property which ought to have been insured at a higher premium. *Greenock Steamship Co.* v. *Maritime Insurance Co.* (6) shows the principle which Bailhache J. sought to apply. The words of this clause ought to be construed as he has construed them, and there is no reason why they should be cut down.

[They were stopped by the Court.]

Compston, K.C., in reply. *Greenock Steamship Co.* v. *Maritime Insurance Co.* (6) does not help at all as to the meaning to be given to the words of this contract.

LORD READING C.J. This is an appeal from a decision of Bailhache J. in favour of the plaintiffs, who claim to recover from the defendant underwriters the amount of the loss which they have sustained on certain machinery insured by them with the defendants for a voyage from London to Malta which has been damaged to the extent of 55*l.*

(1) (1876) 1 App. Cas. 209.
(2) (1875) L. R. 10 C. P. 609; 1 App. Cas. 713.
(3) [1901] 2 K. B. 912.
(4) (1895) 1 Com. Cas. 11.
(5) (1766) 3 Burr. 1905, 1909, 1910.
(6) [1903] 1 K. B. 367.

C. A. 1915

HEWITT BROTHERS v. WILSON.

Lord Reading C.J.

The plaintiffs' case is made under a policy of marine insurance by which all the goods were insured against loss or injury happening to them from ordinary marine perils including risk of breakage during their transit from London to the consignee in Malta; and they say that damage has occurred and that, though they cannot say what was the exact cause of the damage, they can show that during the period covered by the policy the goods were in fact damaged. Bailhache J. held that there was prima facie sufficient to entitle the plaintiffs to recover.

On the other hand, the underwriters say that they are entitled to repudiate, and have repudiated, the policy upon the ground that there has been concealment or non-disclosure by the plaintiffs of material facts. They make no charge against the plaintiffs of dishonesty or intentional suppression or concealment of material facts. All they contend is that the omission to disclose a material fact—a fact material for the underwriters to know when they were negotiating the terms of the policy—is sufficient to bring the case within the purview of ss. 17 and 18 of the Marine Insurance Act, 1906, and to entitle them to avoid the policy.

Upon the facts as found by Bailhache J. it appears that four cases of machinery were shipped for the voyage, and that three of them were new machinery and one was old. They were all shipped for the voyage from London to Malta under the description "four cases of printing machinery." There is no doubt that they were four cases of printing machinery. But the defendants' case is that in regard to the one case of second-hand machinery the description was an incorrect one—that it was an "incorrect definition of the interest insured" within the meaning of the "held covered" clause in the slip attached to the policy.

The plaintiffs' answer to that is that they have for years shipped old machinery under the simple description of "machinery," and that they have so insured with the defendants, and that they have made claims for loss in such cases and have succeeded, no question of misdescription having ever been raised; and they say that they thought that the description "machinery" for new and second-hand machinery was a correct definition of the interest insured, and they called

witnesses accustomed to deal with both kinds of machinery who supported that view.

The defendants reply that they do not insure second-hand machinery under the simple description "machinery," and that, if it is desired to have second-hand machinery insured, it ought to be described as such. One of their witnesses went so far as to say that he would never insure second-hand machinery at all. It is to be borne in mind that they insure different classes of machinery without distinction, at a uniform or flat rate of only 12*s.* 6*d.* per cent.; the consequence of which is that, if in the case of valuable machinery they on the one hand receive less insurance premium than they otherwise would, on the other hand their liability is less because they have less to pay in the event of loss or injury. That, however, is immaterial.

Bailhache J. found that the fact which was not disclosed was one which it was material for the underwriters to know, but that the omission to disclose it was unintentional and honest; and having come to that conclusion he held that by reason of the concluding words of the "held covered" slip attached to the policy the defendants were not entitled to repudiate, notwithstanding his finding that there had been non-disclosure of a material fact. He would, he said, have come to a different conclusion if the misdescription had been intentional. That comes to this, that an incorrect description does not warrant repudiation under the clause if the misdescription be unintentional. And accordingly he held that the clause was sufficient to protect the assured.

The first point made by the appellants is that the incorrectness referred to in the words "any incorrect definition of the interest insured" was meant to apply to the insurable interest of the assured and not to the subject-matter insured. It is said that "interest" is a well-known term in insurance use and is frequently used in the Marine Insurance Act, 1906, and that it has always been held to mean insurable interest. But this is a mercantile document, and we must construe a mercantile document reasonably and in accordance with the ordinary and recognized canons of construction, and, so reading it, I think it is not possible to give the words the meaning for which the appellants

C. A. 1915

HEWITT BROTHERS v. WILSON.

Lord Reading C.J.

contend—to do so would in fact be to give the words no effect at all. I find great difficulty in conceiving a state of circumstances to which they could apply if we were to give the words the meaning contended for, and there is very good reason for holding that such an incorrect description as this should not vitiate the policy. I find nothing to force me to adopt the suggested construction, which would, in my judgment, lead to a wholly unreasonable state of things, and I do not think commercial men ever intended such a construction. Still I must adopt the rules of construction. I have looked through the statute and I asked counsel for the appellants if they could point out anything in it which showed that the words "interest insured" in the slip meant insurable interest. They have not done so. I have no hesitation in coming to the conclusion that the true meaning is that they refer to the subject-matter insured. The one thing which need not be disclosed is the insurable interest (s. 26, sub-s. 2). Even if the assured had had no insurable interest at the time when the policy was effected, that would not have avoided the contract (s. 6, sub-s. 1). I agree with Bailhache J. that the words of the "held covered" clause refer to subject-matter and not to insurable interest.

Next it is contended that, even if that be so, yet the underwriters can nevertheless exercise the right conferred on them by ss. 17 and 18 of the Act and repudiate the policy. It was argued that it was a matter of importance to preserve to them the right to repudiate for non-disclosure of a material fact. I quite appreciate that and I agree that, unless there is something to the contrary in the contract or in some act of waiver, the right should be preserved. But, where there is a provision that the assured is always to be held covered—even though on payment of an extra premium—the contract in my judgment cannot be avoided if the event which was intended to be covered has happened. The view which I take is, I think, supported by Bigham J. in *Greenock Steamship Co.* v. *Maritime Insurance Co.* (1) The clause there was "Held covered in case of any breach of warranty, deviation $\frac{\text{and}}{\text{or}}$ any unprovided incidental risk or change of voyage, at a premium to be hereafter

(1) [1903] 1 K. B. 367, at p. 374.

arranged." The breach was a breach of warranty of seaworthiness. Nothing could be more important than such a warranty. Nevertheless Bigham J. held that the shipowner was entitled to require the underwriters to hold him covered so soon as he discovered the breach of warranty to have happened. I think that, when you come to the conclusion that "interest insured" in the "held covered" clause means "subject-matter insured," you must hold the assured protected in this case.

I notice from the observations of Bailhache J. on the words of the clause and its object that he thought that the clause would only apply where the misdescription had been unintentional. In this case counsel for the appellants has argued that the incorrect description was intentional. I am unable to appreciate the contention that intentional concealment does not mean false and dishonest concealment. If a case of false and dishonest concealment were to arise, no doubt the Courts would hold that it was not covered by the clause in this policy. I do not think the words could be held to protect a man who had made such a misrepresentation.

I think the decision of Bailhache J. was right and the appeal fails.

SWINFEN EADY L.J. By a policy of marine insurance subscribed by the defendants the plaintiffs insured four cases of printing machinery on a voyage from London to Malta "to pay average and including risk of breakage." Three of the cases contained new, and the fourth contained second-hand, machinery. One case of new and one of old machinery were damaged during the voyage. The plaintiffs had described the whole four cases as "machinery" and acted honestly in so doing, believing it to be a proper and sufficient description. They knew the facts, and that one of the cases of machinery was second-hand. Bailhache J. held that the description of the case of old machinery as "machinery" simply, without the addition of the word "second-hand," was a concealment of a material fact and was also an incorrect definition of the interest insured. I take the facts as found by Bailhache J. After saying that the assured

C. A. 1915

HEWITT BROTHERS v. WILSON.

Swinfen Eady L.J.

were under no mistake of fact, he added (1): "They were, however, under a misapprehension as to the necessity of describing this machinery as second-hand, and the mistake arose in this way: First, it is a common practice in this trade to ship all machinery, new or old, as machinery simpliciter. The proportion of second-hand machinery shipped is comparatively small. Secondly, they themselves had done so for years, and had on many previous occasions so insured with these same defendants. Thirdly, although machinery differs largely in its liability to breakage in transit, some kinds being more delicate than others, these underwriters had never inquired, as many underwriters do, as to the class of machinery they were insuring, but had taken it all at a uniform or flat rate of 12*s.* 6*d.* per cent., and that too irrespective of the length or nature of the insured voyage. Under these circumstances the plaintiffs say, and I believe them, that they thought these defendants were indifferent on the subject, and were, to use a popular expression, willing to take the rough with the smooth. In short, the plaintiffs, though knowing that this machinery was second-hand, honestly thought that to describe it as machinery was a sufficient and correct definition of the interest insured." So far as the plaintiffs were concerned there was good faith, but Bailhache J. held that there was a misapprehension on their part, and an insufficient and so an incorrect description.

The question is whether that is cured by the clause in the policy that "in the event of any incorrect definition of the interest insured it is agreed to hold the assured covered at a premium (if any) to be arranged." The appellants say that the words "interest insured" refer only to the insurable interest which the assured had in goods the subject-matter of the policy. But that is not a matter which is required to be specified in or dealt with by the policy, and the assured need not even have any insurable interest in the subject-matter at the time when the insurance is effected (see s. 6, sub-s. 1, of the Marine Insurance Act, 1906). In my opinion the words "interest insured" in the "held covered" clause have reference, not to "insurable interest," but to "subject-matter insured." That is

(1) [1914] 3 K. B. 1134.

a matter which must be disclosed under s. 23 of the Act, which enacts that "a marine policy must specify," among other things, "the subject-matter insured." The object of the clause in the policy is to protect the assured if there is any mistake or slip in these matters required to be specified. If the construction of the words for which the appellants contend were to prevail, it would come to this, that the clause would be so limited in its application that it would operate only in regard to some immaterial matter or matter which could not be known or reasonably be known to the assured. In other words, if through carelessness there were a misdescription of the subject-matter, the assured would not be covered unless it was in an immaterial particular or on a matter which was not known or could not reasonably be known to the assured. No such limited construction should be given to the words. I agree with the view of Bailhache J. that the clause would not protect an assured who had intentionally misdescribed, whether by concealment or untrue statement, the interest insured. But it does protect an assured who, as here, has under a misapprehension made an honest and bona fide slip. Such a case is covered, and was intended to be covered, by the "held covered" clause.

I agree that the appeal should be dismissed.

BRAY J. I agree. The main question is what is the true construction of this "held covered" clause. Two points have been urged upon us in respect of it. First, it is said on behalf of the appellants that the words "incorrect definition of the interest insured" mean incorrect definition of insurable interest and not incorrect description of the subject-matter insured. I agree that one must apply the ordinary principles of construction to the words. Under the Marine Insurance Act, 1906, and under the ordinary law merchant it is not necessary to disclose the interest of the assured at all; therefore the words "definition of the interest," if "interest" is to be taken as meaning insurable interest, do not describe anything generally found in policies. I can see no reason for giving these words any such meaning. The term is a good one to use in order to designate the subject-matter of the insurance and I see no reason why an artificial

C. A. 1915

HEWITT BROTHERS v. WILSON.

Bray J.

meaning should be given to it when subject-matter insured is the natural meaning—particularly when it is remembered that in this same policy there is another clause containing the word "interest" where it is clearly used as meaning the subject-matter of the insurance.

The next question is a little more difficult. It is said that the words "incorrect definition of the interest insured" do not include non-disclosure of a material fact. I do not think they should be given this limited meaning. The clause implies that the incorrect definition is a material one because it provides for an increase of premium in that event. If the words are to be considered as not including non-disclosure of a material fact you are limiting their operation to cases which only happen very infrequently, say, once in a hundred times. I see no reason for limiting these words any more than the words "breach of warranty" could be limited so as to exclude a case of unseaworthiness. I agree with Bailhache J. that the clause is not intended to protect an assured in the case of an intentional and deliberate misdescription where fraud is present. But, in saying that, I am in no way suggesting any limitation to the meaning of the words. In their ordinary signification they would not include a fraudulent non-disclosure or misdescription.

For these reasons, in my opinion, the appeal fails.

Appeal dismissed.

Solicitors for appellants: *Ballantyne, Clifford & Hett.*
Solicitors for respondents: *Ashley, Tee & Sons.*

A. L.

[COURT OF CRIMINAL APPEAL.]

1915
April 26.

THE KING *v.* KURASCH.

Criminal Law—Evidence—Cross-examination of Prisoner—Question tending to show Bad Character—Relevant Matter—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*).

The appellant and four other men were tried and convicted for conspiring by means of false pretences to defraud the prosecutor, the false pretences alleged being the holding of a mock auction.

The defendants denied the false pretences and also alleged that they were all merely the servants of a woman who was the proprietress of the auction business. Evidence was given for the prosecution that the appellant had said at the time of his arrest that one of the other defendants was employed by him. The appellant gave evidence and was asked in cross-examination whether it was not the fact that he and the proprietress of the business were at the date of the offence living together as man and wife. The appellant answered the question in the affirmative. The appellant appealed against his conviction on the ground that this question was a contravention of the Criminal Evidence Act, 1898, s. 1 (*f*), in that it tended to show that he was a person of bad character:—

Held, that, the defence having raised the issue that the defendants were only the servants of the proprietress of the business, it was material to show what were the real relations existing between her and the appellant, and that the question was therefore admissible.

Principle of law laid down in *Rex* v. *Fisher* [1910] 1 K. B. 149 and *Rex* v. *Rodley* [1913] 3 K. B. 468 approved and applied.

Appeal against conviction.

The appellant, Hyman Kurasch, was tried at the Central Criminal Court with four other men on an indictment which charged that they did unlawfully conspire together by means of false pretences to cheat and defraud one Abraham Haimoff of 1*l.* 12*s.* In a second count they were charged with conspiring to steal that sum from Haimoff.

The case for the prosecution was that on March 4, 1914, at about 1 P.M., the appellant and the other defendants were all engaged in conducting a mock auction at the City Auction Rooms, High Street, Whitechapel, one of the defendants acting as auctioneer and the others being present ostensibly as members of the public, and that in the course of the auction they obtained

1915

REX v. KURASCH.

the sum of 1*l.* 12*s.* from Haimoff by means of certain false pretences.

All the defendants denied the alleged false pretences and contended that the auction was a bona fide auction conducted on behalf of a Mrs. Dyas, who was the proprietress of the business and whose servants they were; but evidence was given by a police officer that the appellant when arrested had referred to one of the other defendants as having been employed by him (the appellant) and as having only been with him for two or three days.

The appellant, who gave evidence, denied that he was in the auction room at the time spoken of by Haimoff. He stated that on the day in question he left the auction room at noon in order to go with Mrs. Dyas to the office of a registrar of births, deaths, and marriages in Vallance Road, Whitechapel, in order to register a marriage; that he got to the office about 1 P.M., and, owing to the absence of the registrar, was kept waiting there for some time and did not leave the office till 3 P.M. In cross-examination, in answer to questions by counsel for the prosecution, the appellant admitted that he had been living with Mrs. Dyas as her husband for the past nine months. He also said that Mrs. Dyas was with him when he was arrested, but he denied that he had said that he had employed one of the defendants. The appellant also stated in answer to a further question that the marriage which he registered on March 4 was his own marriage with Mrs. Dyas. Counsel for the prosecution then asked him whether Mrs. Dyas was not in fact a married woman living apart from her husband. The Recorder told the appellant that he need not answer the question as it might tend to incriminate him as being an admission that he had been a party to the commission of bigamy by Mrs. Dyas. In his summing up the Recorder told the jury that the question whether Mrs. Dyas had another husband living had no bearing on the charge and that the jury must not allow the fact that a question had been asked as to Mrs. Dyas being a married woman to prejudice them against the appellant.

All the defendants were convicted. Kurasch was the only one who appealed.

1915

REX v. KURASCH.

Newbolt, K.C., and *Anthony Young*, for the appellant. The question asked of the appellant in cross-examination as to whether he was living with Mrs. Dyas was a question tending to show that the appellant was of bad character, and was therefore inadmissible under s. 1 (*f*) of the Criminal Evidence Act, 1898. In order to render admissible a question involving an imputation upon the prisoner's character it must be relevant to the issue: *Rex* v. *Fisher* (1); *Rex* v. *Ellis*. (2) The issue in this case was whether the appellant had conspired with the other defendants to defraud the prosecutor. It was not relevant to that issue to prove that the appellant was living in a certain relationship with the proprietress of the auction room. The question with regard to Mrs. Dyas being a married woman was clearly inadmissible for the reason suggested by the Recorder at the trial. The fact that the question was not answered does not render it unobjectionable, for, as was pointed out in *Rex* v. *Ellis* (3), in most cases the mischief, which the Act intended to prevent, is done by the asking of the question.

[AVORY J. referred to *Rex* v. *Chitson*. (4)]

Roland Oliver (*R. D. Muir* with him), for the Crown. The appellant's defence, in addition to the alibi, involved the suggestion that he and the other defendants were only servants of Mrs. Dyas, who was the proprietress of the business. It was therefore most material to elicit from the appellant the fact that he was living with Mrs. Dyas as her husband, and it was a fact which might properly have been proved by direct evidence on the part of the prosecution. Any question which is relevant to the issue is permissible although it may tend to show that the prisoner has been previously convicted or is of bad character. The question as to whether Mrs. Dyas was a married woman was relevant to the question whether the appellant had in reality gone to the registrar's office. But even if the question was inadmissible, it could not after the Recorder's warning have affected the jury's minds, and therefore the fact that the question was asked is not a ground for quashing the conviction.

(1) [1910] 1 K. B. 149.
(2) [1910] 2 K. B. 746.
(3) [1910] 2 K. B. at p. 763.
(4) [1909] 2 K. B. 945.

1915

REX v. KURASCH.

Newbolt, K.C., in reply cited *Rex* v. *Rodley* (1) and *Makin* v. *Attorney-General for New South Wales.* (2)

The judgment of the COURT (Lord Reading C.J., Lord Coleridge and Avory JJ.) was delivered by

LORD READING C.J. In this case the appellant was convicted on an indictment which charged him and four other persons, who were also convicted but who have not appealed, with conspiring to defraud and steal. The evidence for the prosecution was that the appellant and the four other men were all concerned in carrying on a mock auction at the City Auction Rooms, High Street, Whitechapel, in the course of which the prosecutor was defrauded of a sum of money. The evidence against the appellant was that of three police officers, all of whom stated that the appellant was present and took part in the frauds that were then being carried on. The appellant, who gave evidence, denied that he was present. It is said on his behalf that his conviction must be quashed on the ground that in cross-examination questions were put to him which tended to show that he was a person of bad character, and that that was a contravention of s. 1 (*f*) of the Criminal Evidence Act, 1898. We will first deal with the second of the two questions which were asked. It arose in this way. The appellant had sworn in his evidence in chief that, at the time when the offence was alleged by the prosecutor to have been committed, he was not present at the auction room, because he had gone to the office of a registrar of marriages to register a marriage. In cross-examination he was asked whose marriage it was that he was going to register, and he said that it was his own marriage with Mrs. Dyas, the proprietress of the auction room. Counsel for the prosecution thereupon asked the appellant whether Mrs. Dyas was not in fact a married woman living apart from her husband. That is the second of the two questions which it is now said render the conviction bad. The Recorder pointed out that if the question was answered it might incriminate the appellant as tending to show that he had connived at bigamy on the part of Mrs. Dyas and he told the

(1) [1913] 3 K. B. 468. (2) [1894] A. C. 57.

appellant that he need not answer the question. We do not think it necessary to consider whether the question was admissible in the circumstances of this case, for we think it is sufficient to point out that the Recorder prevented any answer from being given, and further made it as plain as he could to the jury that they must not allow their minds to be prejudiced, or allow the suggestion in any way to weigh against the appellant. That, as has been pointed out in previous cases, is a sufficient reason for not treating the putting of the question as a ground for quashing the conviction. Each case must depend upon its own facts, and there might be a case in which disallowing a question would not afford sufficient protection to the prisoner. In the present case the course adoped by the Recorder prevented the possibility of any harm occurring to the prisoner from the asking of the question.

The other question asked in the cross-examination of the appellant was as to whether he and Mrs. Dyas were not living together as man and wife. It is important to bear in mind that one defence relied on by the appellant was that he was a mere servant or assistant of Mrs. Dyas, who was the proprietress of the business carried on at the auction room. Evidence had been given by the police officers that when the appellant was taken to the police station after his arrest, Mrs. Dyas being present, the appellant said "Don't arrest old Bloater,"—that was a name by which one of the other prisoners was known—"I have only employed him casually. He has only been with me two or three days." If that were true, then the appellant was not merely a servant of Mrs. Dyas. Then, in cross-examination of the appellant counsel for the prosecution asked with reference to Mrs. Dyas: "Are you and she living together? Ans. I am. Q. How long have you been living together with Mrs. Dyas? Ans. Nine months. Q. Now, is it not true that when you were arrested and when you were with Mrs. Dyas, with whom you had been living at that time, you said to the officer who arrested you, 'Do not charge old Bloater, I have only employed him casually.'? Ans. I did not." Those being the circumstances in which this question was asked, we have to consider whether the relations of the appellant with Mrs. Dyas were in any sense

1915

REX v. KURASCH.

material to the issue. The question is not whether the matter remotely bore on the issue, but whether it was really relevant to it. In *Rex* v. *Rodley* (1) the following passage from the judgment of Channell J. in *Rex* v. *Fisher* (2) was quoted by Bankes J. in delivering the judgment of the Court: "The principle is clear, however, and if the principle is attended to I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence"; and then Bankes J. went on to say: "As here pointed out by Channell J., the governing rule must always be that any evidence to be admissible must be relevant to the issue." We do not desire in the least to depart from the principles of law as there laid down. The only difficulty that arises is in applying those principles to the facts of this case, but we have come to the conclusion that it is impossible to say that a question as to the real relations which existed between the appellant and Mrs. Dyas was not material to the issue. It would materially assist the prosecution to establish their case if they could show that the appellant was not a mere servant of Mrs. Dyas, but that he occupied a more important position, and that, according to the evidence of the police officer, he had said he had employed one of the men engaged in the auction. In these circumstances it cannot, in our opinion, be said that a question as to the relations between the appellant and Mrs. Dyas was not relevant to the issue. The case seems to us to come very close to the decision in *Rex* v. *Chitson* (3), and to come

(1) [1913] 3 K. B. at p. 472. (2) [1910] 1 K. B. at p. 152.
(3) [1909] 2 K. B. 945.

within the principle laid down in the other cases to which attention has been drawn.

1915

REX v. KURASCH.

For these reasons we are of opinion that the conviction must stand.

Appeal dismissed.

Solicitors for appellant: *Edgar & Co.*

Solicitors for the Crown: *Wontner & Sons.*

F. O. R.

[COURT OF CRIMINAL APPEAL.]

1915

March 30.

THE KING *v.* OPPENHEIMER AND COLBECK.

Criminal Law—War—Trading with the Enemy—Obtaining Goods from the Enemy—Trading with the Enemy Act, 1914 (4 *& 5 Geo.* 5, *c.* 87), *s.* 1, *sub-ss.* 1 *and* 2—*Proclamations of August* 5 *and September* 9, 1914, *relating to Trading with the Enemy.*

Sect. 1, sub-s. 1, of the Trading with the Enemy Act, 1914, makes it an offence for any person during the war to trade with the enemy within the meaning of the Act; and by sub-s. 2 a person shall be deemed to have traded with the enemy if he has done any act prohibited by any Royal Proclamation dealing with trading with the enemy.

The Proclamations of August 5 and September 9, 1914, dealing with trading with the enemy prohibit the obtaining of goods, wares, or merchandise from an enemy.

A defendant was charged under the above Act with the offence of obtaining goods from the German Empire. He carried on business in England as a lithographic printer, and previously to the war had had business dealings with a German firm in Nuremberg. As a result of these dealings there was at the date of the outbreak of war between Great Britain and Germany in the possession of the German firm at Nuremberg a number of lithographic transfers to delivery of which the defendant was entitled. He subsequently procured the delivery of some of these transfers to himself in England. At the trial the judge directed the jury (1.) that the transfers were "goods, wares, or merchandise," and (2.) that the above facts constituted in law an obtaining of goods by the defendant from an enemy, within the meaning of the Proclamations. The defendant was convicted:—

Held, that the direction of the judge was right on both points, and that the defendant was rightly convicted.

APPEALS against conviction and sentence.

The appellants, Julius Oppenheimer and Thomas William Colbeck, were tried at the Central Criminal Court on an

1915

REX v. OPPENHEIMER AND COLBECK.

indictment which charged them in the first count with unlawfully conspiring on divers days between August 5 and December 11, 1914, with certain other persons unlawfully to trade with the enemy within the meaning of the Trading with the Enemy Act, 1914 (1), to wit, with conspiring to obtain goods from the enemy contrary to the Royal Proclamations relating to trading with the enemy dated respectively August 5 and September 9, 1914. Other counts of the indictment charged that the appellant Oppenheimer on various dates between August 29 and November 7, 1914, did unlawfully trade with the enemy within the meaning of the said Act by unlawfully obtaining from the German Empire and from one Fritz Schneller certain goods, wares, and merchandise, to wit, lithographic transfers, and that the appellant Colbeck aided and abetted him in so doing.

From the evidence given at the trial by the witnesses for the prosecution and by the appellants the following facts appeared. Oppenheimer was by birth a German subject. He became a naturalized British subject in 1889, and in 1890 he started business as a lithographer in Newgate Street in the city of London.

(1) Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 1: "(1.) Any person who during the present war trades or has, since the fourth day of August nineteen hundred and fourteen, traded with the enemy within the meaning of this Act shall be guilty of a misdemeanour, ...

"(2.) For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force . . . ."

Proclamation dated August 5, 1914, relating to trading with the German Empire (No. 1252): ". . . . Whereas it is contrary to law for any person resident, carrying on business, or being in Our Dominions, to trade or have any commercial intercourse with any person resident, carrying on business, or being in the German Empire without Our permission . . . . Now, therefore, ... We do hereby warn all persons resident, carrying on business, or being in Our Dominions: Not to supply to or obtain from the said Empire any goods, wares, or merchandise . . . ."

The Trading with the Enemy Proclamation, No. 2, dated September 9, 1914 (No. 1376), revoked the Proclamation of August 5 and by par. 7 of clause 5 substituted for the above language the following: "Not directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy country or an enemy, any goods, wares, or merchandise."

In 1912 he built a factory at Willesden and traded there as a printer under the name of the Chromo Company. Part of his business consisted in obtaining orders for designs for lithographic works, but as the workmen at the Willesden factory were not able to do the work of lithographing on stone, the course of business was to send the designs to a German firm named Schnellers who carried on business at Nuremberg. Schnellers lithographed the designs on stone and supplied Oppenheimer with as many copies of each design as he required, for which copies he paid Schnellers. By an arrangement between Oppenheimer and Schnellers, for every 400,000 copies ordered by the appellant of any one design that Schnellers lithographed for him, Oppenheimer was entitled to receive from Schnellers free of charge a "transfer" of that or some other design. These transfers were printed on a grease-proof paper and when received by Oppenheimer in this country were retransferred to stones at his Willesden factory, and in this way copies of designs could be made at that factory although the work of lithographing the design on the stones had been done at Nuremberg.

A very large amount of work was done by Schnellers at Nuremberg for Oppenheimer, and as a result at the date of the outbreak of the war there was a large number of transfers in existence at Schnellers' place of business which would in the ordinary course have been sent to Oppenheimer in this country.

After the declaration of war Oppenheimer on some of the dates mentioned in the indictment obtained with the assistance of Colbeck, who was in his employment, delivery in England of a certain number of these transfers, and it was alleged by the prosecution that by so doing he had committed the offences charged in the indictment. No payments were made by Oppenheimer to Schnellers after the declaration of war in respect of work done by Schnellers for him.

The case was tried by Atkin J. At the conclusion of the evidence it was submitted by counsel for the defendants (1.) that it was a question for the jury whether the transfers were "goods, wares, or merchandise" within the meaning of the Proclamations; (2.) that it was a question for the jury whether the act of Oppenheimer in obtaining from Germany transfers which were his

1915

REX v. OPPENHEIMER AND COLBECK.

own property constituted a trading with the enemy within the meaning of the Act.

Atkin J. held (1.) that it was a question of law whether the transfers were, and he held that in law they were, "goods, wares, or merchandise"; and (2.) that the prohibition against obtaining goods from the enemy applied to a case where the goods were the property of the person obtaining them. The learned judge directed the jury that if they were of opinion that Oppenheimer had obtained the transfers from Germany, and that Colbeck had assisted him in so doing, which was not really disputed, it was their duty to find the defendants guilty.

The jury found the defendants guilty, and Oppenheimer was sentenced to two months' imprisonment in the second division and was ordered to pay the costs of the prosecution. Colbeck was sentenced to one month's imprisonment in the second division.

Sir E. Carson, K.C., and *Harold Morris*, for the appellants. First, these transfers were not "goods, wares, or merchandise" within the meaning of the Proclamations relating to trading with the enemy. Secondly, the learned judge was wrong in directing the jury that as a matter of law the admitted facts showed that there had been an obtaining of goods from the enemy within the meaning of the Proclamations. In the first place a person cannot be said to obtain goods from the enemy if he merely obtains goods which, as was the case here, are his own property and which for some reason or other are temporarily in the possession of the enemy. Further, the offence created by the Trading with the Enemy Act, 1914, is limited to "trading" with the enemy, and although the Act provides that the doing of any act prohibited by the Proclamations dealing with trading with the enemy constitutes the offence, the words of the Proclamations "obtain from an enemy" must be construed with reference to the object of the Proclamations, namely, the prohibition of trading with the enemy; and it is not every kind of obtaining goods which is prohibited, but only such an obtaining as arises in the way of trade or in the course of commercial transactions. The jury should have been directed

that that was the meaning of the Proclamations and it should have been left to the jury to find as a fact whether in the circumstances of this case the obtaining of the transfers was an obtaining of goods from the enemy within that meaning.

R. D. Muir and *Cecil Whiteley*, for the Crown, were not called upon to argue.

The judgment of the COURT (Lord Reading C.J., Bray and Lush JJ.) was delivered by

LORD READING C.J. The appellants were convicted on an indictment which charged them and certain other persons with conspiring unlawfully to trade with the enemy. The appellant Oppenheimer was also convicted of unlawfully trading with the enemy on certain specified dates, and the appellant Colbeck was convicted of aiding and abetting him. The learned judge sentenced Oppenheimer to two months' imprisonment in the second division and ordered him to pay the costs of the prosecution. Colbeck was sentenced to one month's imprisonment in the second division. Both appellants appeal against their conviction on questions of law, and also against sentence.

The facts of the case are not in dispute and were not really challenged at the trial. Oppenheimer, who was by birth a German subject, became naturalized in this country in 1889, and in 1890 he started business as a lithographer in the city of London. In 1912 he built a factory at Willesden and traded there as a printer. His business was undoubtedly of a large character, and he had extensive business relations with a firm of Schnellers at Nuremberg, particularly with regard to lithographic printing. It is not necessary to discuss in detail the terms of the arrangement between Oppenheimer and Schnellers. It is sufficient to say that for every 400,000 copies of a design printed for Oppenheimer by Schnellers the former was entitled to receive what is called a transfer of that or some other design.

It is not disputed that between August 4, the date on which war was declared, and October 5 Oppenheimer did, with the assistance of Colbeck, on various occasions obtain from Nuremberg a certain number of these transfers. The question is whether that constitutes an obtaining of goods from the enemy within the

1915

REX v. OPPENHEIMER AND COLBECK.

meaning of the Proclamations relating to trading with the enemy issued on August 5 and September 9 and legalized by the Trading with the Enemy Act, 1914. The case turns on the following words in the Proclamation of August 5, which were substantially re-enacted in the Proclamation of September 9: "And whereas it is contrary to law for any person resident, carrying on business, or being in Our Dominions, to trade or have any commercial intercourse with any person resident, carrying on business, or being in the German Empire without Our permission . . . . Now, therefore, We have thought fit . . . . and We do hereby warn all persons resident, carrying on business, or being in Our Dominions"—the following are the important words—"not to supply to or obtain from the said Empire any goods, wares, or merchandise." In the first place it is said that obtaining these transfers was not, as a matter of law, obtaining goods, wares, or merchandise. Atkin J. ruled, as a matter of law, that these transfers were goods, wares, or merchandise within the meaning of the Proclamations, and we are of opinion that he was right in so holding. Then it is contended on behalf of the appellants that a man cannot as a matter of law be said to obtain goods, wares, or merchandise "from the said Empire" if he obtains the goods in such circumstances that he has not to make any payment for them. It is not said that on the facts of this case it would not have been open to the jury to find that there was an obtaining of goods within the meaning of the Proclamations; but it is said that the goods must be obtained in the way, of trade, and that the case ought to have been left to the jury with a direction from the learned judge which left it open to the jury to say whether or not as a matter of fact the goods were in the circumstances of this case obtained in the way of trade. The argument has been put in a variety of ways, but that is the substantial point of law upon which the whole case turns, namely, that the operative words in both Proclamations must be read in relation to trading and have no effect except in relation to trading, and that the question whether or not there had been in this case an obtaining of goods in relation to trading was not a matter of law to be decided by the judge, but one which should have been left to the jury.

When one looks at the language of the Proclamations the question as regards the facts of this case seems to us to be quite clear. We are only entitled to consider the language of the recital if we think that there is any ambiguity in the words of the operative part of the Proclamations. In our opinion it would not be impossible to conceive of a case in which the circumstances were such that it would be proper to leave the question to the jury with some direction such as Sir Edward Carson has suggested, but in the present case, bearing in mind the relations that existed between the parties, it seems to us that it is impossible to hold any other view than that Atkin J. was right when he said that as a matter of law the admitted facts amounted to an obtaining of goods from the enemy. It may be that the language used by the learned judge is capable of bearing a wider construction than that, but we are satisfied that where goods are supplied from the enemy country under a commercial contract, or in consequence of commercial relations, or as a result of commercial intercourse between the enemy and the British subject, that amounts to obtaining goods within the meaning of the Proclamations. The words "obtain from" are used as the correlatives of "supply to," and the matter becomes even more clear if, as one is entitled to do, one changes the phraseology and reads it as if it were "to supply from the said Empire." Putting it in that way, which is not an unfavourable way for the appellants, it appears to us plain in this case that the judge rightly directed the jury that as a matter of law the case came within the Proclamations and that there was in law an obtaining of goods, wares, or merchandise within the language of the Proclamations. That being so, the conviction of both the appellants must stand.

[The Lord Chief Justice then dealt with the appeals against sentence and stated that it was impossible to interfere with the sentences.]

Appeal dismissed.

Solicitors for appellants: *Kenneth Brown, Baker, Baker & Co.*
Solicitor for the Crown: *Director of Public Prosecutions.*

F. O. R.

1915
May 3.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* THOMAS EVANS.

Criminal Law—Vagrancy—Incorrigible Rogue—Second Conviction as Rogue and Vagabond—Power of Quarter Sessions to sentence—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *ss.* 5, 10.

Before a Court of quarter sessions can sentence an offender under s. 10 of the Vagrancy Act, 1824, it is necessary that he should have been convicted of being an incorrigible rogue by a Court of summary jurisdiction under s. 5 of the Act. It is not sufficient that the Court of summary jurisdiction should have convicted him of matters on conviction whereof he is to be deemed an incorrigible rogue if the Court does not actually proceed to convict him of being an incorrigible rogue.

Appeal against sentence.

On March 18, 1915, the appellant was convicted by a Court of summary jurisdiction at Oswestry in the county of Salop of being a rogue and vagabond within the intent and meaning of the Vagrancy Act, 1824, for that he on March 10, 1915, at Oswestry aforesaid, then being a suspected person unlawfully did loiter in a certain place of public resort there called the Cambrian railway station with intent to commit a felony. The statute constituting the offence was the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4, as amended by the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 15, and the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 7.

The record of conviction proceeded in the following words: "And whereas it is now duly proved that the said defendant hath been at some former time, to wit, on December 23, 1914, before the Court of summary jurisdiction sitting at the sessions house in the city of Lincoln convicted of being a rogue and vagabond within the intent and meaning of the Vagrancy Act, 1824, aforesaid for that he on December 15, 1914, at the said city then being a suspected person unlawfully did loiter in a certain public place called the Lincoln cattle market with intent to commit a felony, to wit, feloniously to steal the moneys goods and chattels of divers persons whose names are respectively unknown from their persons contrary to the form of the statute

1915

REX v. EVANS.

in such case made and provided And was adjudged for his said last mentioned offence to be imprisoned in His Majesty's prison at Lincoln and there kept to hard labour for the space of three calendar months It is adjudged that the said defendant for his said first mentioned offence for which he is now convicted before us as aforesaid be imprisoned in His Majesty's prison at Shrewsbury in the county of Salop aforesaid and there kept to hard labour until the next general quarter sessions of the peace to be holden at the Guildhall, Oswestry, aforesaid in and for the said borough to be then and there further dealt with according to law."

On April 9, 1915, the appellant was brought before the recorder and justices at the general quarter sessions of the borough of Oswestry to be dealt with as an incorrigible rogue under s. 10 of the Vagrancy Act, 1824. (1) It was argued on his behalf that as the Court of summary jurisdiction had not convicted him of being an incorrigible rogue there was no jurisdiction in the quarter sessions to deal with him as such. The Court of quarter sessions overruled this contention and sentenced him to a term of eleven months' imprisonment with hard labour.

The order of the quarter sessions recited that Thomas Evans, the appellant, had been committed to prison at Shrewsbury by virtue of a warrant of the Court of summary jurisdiction dated March 18, 1915, issued by virtue of a conviction under the

(1) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 5: "Every person committing any offence against this Act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be and duly convicted thereof . . . . shall be deemed an incorrigible rogue within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to remain until the next general or quarter sessions of the peace . . . ."

Sect. 10: "When any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned in the house of correction, and be there kept to hard labour for any time not exceeding one year from the time of making such order."

1915

REX v. EVANS.

Vagrancy Act, 1824, founded upon the convictions of December 23, 1914, and March 18, 1915, "whereby," as the order proceeded to state, "the said Thomas Evans became an incorrigible rogue within the true intent and meaning of the said Act." The order continued as follows: "And the said Thomas Evans having been now brought into the Court and now charged with the said offence so alleged to have been committed by him on March 10 last and the said Court having examined into the circumstances of the said case and the premises being seen and understood by the said Court It is considered by the said Court here that the said Thomas Evans be and he is accordingly adjudged an incorrigible rogue the said offence stated in the said conviction of the said Thomas Evans being the second offence of the said Thomas Evans And this Court doth adjudge and order that the said Thomas Evans be and he is hereby committed to His Majesty's prison at Shrewsbury for the space of eleven calendar months there to be kept to hard labour."

The appeal was against this sentence.

H. H. Joy, for the appellant. The Court of quarter sessions had no jurisdiction to sentence the appellant. The jurisdiction of that Court is derived from s. 10 of the Vagrancy Act, 1824. The Court can only sentence an incorrigible rogue, that is one who has been "thereof convicted" by a Court of summary jurisdiction under s. 5 of the Act: *Rex* v. *Johnson*. (1) The appellant was never convicted of being an incorrigible rogue by the Court of summary jurisdiction. The quarter sessions attempted to supply the defect by themselves adjudging the appellant to be an incorrigible rogue. They have no power whatever to do this. [He also referred to *Reg.* v. *Reed*. (2)]

Roland Oliver, for the Crown. The point taken on behalf of the appellant is merely technical. By s. 5 of the Act on proof of certain matters a person is to be deemed an incorrigible rogue. The Court of summary jurisdiction has no option in the matter. The law defines the status of the offender. That status is not affected by the omission of the words "incorrigible rogue" from the record of the conviction which establishes it. Being

(1) [1909] 1 K. B. 439. (2) (1858) 22 J. P. 271.

twice convicted as a rogue and vagabond, he becomes an incorrigible rogue punishable by quarter sessions under s. 10 of the Act.

Joy in reply. This is more than a matter of technicality. Courts of summary jurisdiction acting under s. 5 of the Act may, and do, exercise a discretion as to whether they will themselves deal with an offender or leave him to be dealt with by quarter sessions. The section says no more than that "it shall be lawful" for the Court of summary jurisdiction to commit the offender to the house of correction, there to remain till the next quarter sessions. It does not oblige them to do so.

The judgment of the COURT (Lord Reading C.J. and Avory and Low JJ.) was delivered by

LORD READING C.J. The appellant was convicted of an offence under the Vagrancy Act, 1824. According to the record of the Court of quarter sessions he was adjudged by that Court to be an incorrigible rogue and was thereupon sentenced to imprisonment for eleven months with hard labour. He appeals against that sentence. On such an appeal we have to consider whether the sentence is justified and, for that purpose, to see whether there was anything which warrants the sentence being passed.

By s. 4 of the Vagrancy Act, 1824, it shall be lawful when a person has been convicted of being a rogue and vagabond within the meaning of the statute to send him to prison with hard labour for three calendar months. By s. 5 of the same Act, in certain cases a person may be sent to prison, there to remain until the next general or quarter sessions. A person who, having already been adjudged to be a rogue and vagabond and duly convicted thereof, again commits an offence subjecting him to be dealt with as a rogue and vagabond, is to be deemed an incorrigible rogue; and then in the words of the section "it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to remain until the next general or quarter sessions of the peace." Then by s. 10 the quarter sessions may deal with the case and inflict a sentence of twelve months' imprisonment with hard labour.

1915

REX v. EVANS.

The point in this appeal arises on the face of the conviction by the Court of summary jurisdiction. The appellant had already been convicted of being a rogue and vagabond. He was convicted for the second offence subjecting him to be dealt with as a rogue and vagabond, but it nowhere appears on the face of that conviction that he was ever convicted of being an incorrigible rogue. In that form the conviction came before the Court of quarter sessions. That Court has no power to inquire whether or not a person is an incorrigible rogue; it can only look at the record of the conviction and see whether the offender has been convicted of being an incorrigible rogue. This is not a mere technicality. It is a point of substance. It does not follow, when a person has been convicted for the second time as a rogue and vagabond, that he must necessarily be convicted of being an incorrigible rogue. The Court of summary jurisdiction may take the view that the second offence was so trivial as to be more properly punishable by that Court again convicting the offender as a rogue and vagabond liable to a sentence of three months' imprisonment instead of convicting him of being an incorrigible rogue liable to be sentenced by quarter sessions to imprisonment for twelve months. In the present case the Court of summary jurisdiction convicted the appellant of an offence subjecting him to be dealt with as a rogue and vagabond after he had been convicted of being a rogue and vagabond. It did not convict him of being an incorrigible rogue. If it intended to do that, the intention should have been plainly stated on the face of the record of conviction. It is a condition precedent to the jurisdiction of the quarter sessions to deal with the offender that he should have been convicted by the Court of summary jurisdiction of being an incorrigible rogue. As that condition precedent does not appear to have been fulfilled the quarter sessions had no jurisdiction to deal with the matter. The Court seems to have been alive to this difficulty, because the order of the Court after reciting the two previous convictions proceeds with these words: "whereby the said Thomas Evans became an incorrigible rogue within the true intent and meaning of the said Act." It continues thus: "And the said Thomas Evans having been now brought into the Court and now charged with the offence so

alleged to have been committed by him on March 10 last"—i.e., the second offence subjecting him to be dealt with as a rogue and vagabond—" and the said Court having examined into the circumstances of the case and the premises being seen and understood by the said Court It is considered by the said Court here that the said Thomas Evans be and he is accordingly adjudged an incorrigible rogue," &c. The quarter sessions had no jurisdiction to adjudge him an incorrigible rogue. That was the function of the Court of summary jurisdiction. Therefore, as there was no conviction which gave the quarter sessions the right to impose this sentence, the sentence cannot stand. This conclusion is supported by the case of *Rex* v. *Johnson* (1), where, dealing with an argument similar in principle to that which has been presented to us, Lord Alverstone C.J. said (2): "If the section" —i.e., s. 5 of the Vagrancy Act, 1824—" stopped after the words 'rogue and vagabond,' there would in this case have been an offence committed for which the appellant might have been convicted as an incorrigible rogue, but s. 5 goes on to say 'such person having been at some former time adjudged' to be a rogue and vagabond 'and duly convicted thereof,' and it follows, therefore, that in order to justify a conviction of a person of being an incorrigible rogue he must have been previously adjudged to be a rogue and vagabond and duly convicted thereof. The appellant has never been adjudged to be a rogue and vagabond, although he might have been on the occasion of the conviction on December 12, 1907; and as it appears on the face of the conviction of October 24, 1908, that the previous convictions were for being an idle and disorderly person, and not for being a rogue and vagabond, quarter sessions had no power to sentence him as an incorrigible rogue." It was not necessary for the Court to hold in that case that the quarter sessions would have had power to sentence the offender if he had been convicted by the Court of summary jurisdiction of being a rogue and vagabond merely. The case decided that an offender must be convicted as a rogue and vagabond before he can be convicted of being an incorrigible rogue, and from the ratio decidendi of the case it follows that he must be duly convicted of being an

(1) [1909] 1 K. B. 439. (2) Ibid. at p. 443.

1915

REX v. EVANS.

incorrigible rogue before he can be sentenced as such by a Court of quarter sessions under s. 10 of the Act.

The sentence must therefore be quashed.

Sentence quashed.

Solicitors for appellant: *Philip Baker & Co., Birmingham.*
Solicitor for the Crown: *The Director of Public Prosecutions.*

W. H. G.

1915

May 5, 6.

ATKINSON, APPELLANT *v.* SHAW, RESPONDENT.

Coal Mine—Manager—Liability—Accumulation of Coal Dust—Systematic Clearing—Impracticability—Coal Mines Act, 1911 (1 *& 2 Geo.* 5, *c.* 50), *s.* 62, *sub-s.* 3; *s.* 102, *sub-s.* 3.

By s. 62, sub-s. 3, of the Coal Mines Act, 1911, in every mine, unless the floor, roof, and sides of the roads are naturally wet throughout, the floor, roof, and sides of the roads shall be systematically cleared so as to prevent, as far as practicable, coal dust accumulating.

By s. 101, sub-s. 2, if a mine is not managed in conformity with the Act the owner, agent, and manager are each to be deemed guilty of an offence.

By s. 102, sub-s. 3, nothing in the Act is to render the owner, agent, or manager of a mine liable to a penalty in respect of any contravention of or non-compliance with the provisions of the Act, if he proves that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision.

On an information against the manager of a certain mine for an offence against s. 62, sub-s. 3, the justices found that the roof and sides of the roads in the mine had not been systematically cleared for some months; that it was not practicable to carry out the provision of s. 62, sub-s. 3, in the particular mine; and that the manager had done all that was reasonably practicable in the circumstances to prevent coal dust accumulating:—

Held, that these findings brought the case within s. 102, sub-s. 3, and that the manager was not liable to a penalty.

CASE stated by justices for the county of Glamorgan.

An information was preferred by the appellant, one of His Majesty's inspectors of mines, against the respondent, for that he the respondent being the manager of a mine called the Universal Colliery at Senghenydd, not being a mine the floor,

roof, and sides of the roads whereof are naturally wet throughout, did not cause to be systematically cleared such floor, roof, and sides of the roads of the mine so as to prevent as far as practicable coal dust accumulating conformably with the provisions of s. 62, sub-s. 3, of the Coal Mines Act, 1911. (1)

The justices dismissed the information, but stated the following case:—

"At the hearing of the said information it was proved or admitted in evidence before us—

"1. That the respondent had been duly appointed pursuant to s. 2 of the Coal Mines Act, 1911, and was at all material times manager of the said Universal Colliery.

"2. That the floor, roof, and sides of the roads of the said Universal Colliery were not naturally wet throughout, but were of a dry and dusty nature.

"3. That danger attached to the presence of coal dust in the roads of the mine, and particularly to that which attaches to the sides and roof.

"4. That the respondent had caused the floor of the roads to be systematically cleared and to be well watered.

"5. That the respondent had endeavoured by means of brushing by compressed air blowing and by watering to clear the roof and sides of the roads from coal dust; that the brushing and compressed air blowing were abandoned by the respondent for some four or six months prior to October 14, 1913, because these methods were not found to be satisfactory.

(1) Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50):—

Sect. 62: "In every mine, unless the floor, roof, and sides of the roads are naturally wet throughout,—

. . . .

"(3.) the floor, roof and sides of the roads shall be systematically cleared so as to prevent, as far as practicable, coal dust accumulating;

. . . ."

Sect. 101, sub-s. 2: "If a mine is not managed in conformity with this Act, the owner, agent, and manager thereof shall each be deemed to be guilty of an offence against this Act."

Sect. 102, sub-s. 3: "Nothing in this Act shall render the owner, agent, or manager of a mine liable to a penalty in respect of any contravention of or non-compliance with the provisions of this Act, if he proves that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision."

1915

ATKINSON v. SHAW.

"6. That the respondent had from time to time arched considerable lengths of roadway with stone arching, but that the arching had got crushed by the natural squeeze of the ground.

"7. That watering the roof and sides in the said Universal Colliery would have been dangerous and was impracticable owing to the nature of the strata which would have been pulverized by the action of the water and was consequently abandoned.

"8. It was admitted by the appellant as a practical man and apart from the Act of Parliament that the adoption in the said colliery of the methods of brushing or compressed air blowing, though effective in carrying out what he understood to be the meaning of the Act, would not have been effective in preventing the accumulation of coal dust, and might conceivably under certain circumstances have been dangerous.

"It was contended on behalf of the respondent that the said sub-s. 3 of s. 62 only required him to cause the floor, roof, and sides of the roads to be cleared as far as practicable, and pursuant to this contention he called evidence to show that it was not practicable to systematically clear the sides and the roof of the roads. On the other hand it was contended by the appellant that the said sub-s. 3 required the respondent to cause the roof and sides as well as the floor of the roads to be systematically cleared, and that the words 'as far as practicable' did not govern 'systematically cleared' but did govern the words 'so as to prevent coal dust accumulating,' and that the duty imposed upon the respondent was a direct obligation and an absolute duty to systematically clear the roofs and sides of the roads in the said colliery. The appellant called evidence to show that it was practicable to cause the roof and sides to be 'systematically cleared.'

"We were satisfied (1.) that the roof and sides of the roads in the said Universal Colliery had not been systematically cleared for some months prior to October 14, 1913; (2.) that it was not practicable to carry out this provision of s. 62, sub-s. 3, of the Act in this particular mine. We were of opinion that the respondent had done all that was reasonably practicable under the circumstances to prevent coal dust accumulating and we therefore dismissed the information.

"The question for the opinion of the Court is whether upon the facts so found by us as above we were right in dismissing the information."

Ivor Bowen, K.C., and *Clement Edwards*, for the appellant.

Disturnal, K.C., and *R. O. Roberts* (*Lincoln Reed* with them), for the respondent.

LORD READING C.J. The appellant, one of His Majesty's inspectors of mines, laid an information against the respondent for that the respondent, being the manager of the Universal Colliery at Senghenydd, Glamorganshire,—that mine, the Universal Colliery, not being a mine the floor, roof, and sides of the road whereof were naturally wet throughout,—did not cause the floor, roof, and sides of the roads to be systematically cleared so as to prevent as far as practicable coal dust accumulating in accordance with the provisions of s. 62, sub-s. 3, of the Coal Mines Act, 1911. By that Act of Parliament, which was an Act passed to consolidate and amend the law relating to coal mines, it was provided that in every mine, unless the floor, roof, and sides of the roads are naturally wet throughout, the floor, roof, and sides of the roads should be systematically cleared so as to prevent, as far as practicable, coal dust accumulating. Now in this case it was proved that the respondent had caused the floor of the roads to be systematically cleared and well watered, but, although he had endeavoured by means of brushing by compressed air blowing and by watering to clear the sides and roof of the roads of coal dust, the brushing and compressed air blowing was abandoned by him for some four or six months prior to October, 1913, because it was found that these methods were not satisfactory. It is found as a fact that watering the roof and sides of the colliery would have been dangerous, and that that course would have been impracticable owing to the nature of the strata, which would have been pulverized by the action of the water; and consequently that course which had been adopted for some time was abandoned.

The appellant, viewing the matter as a practical man with knowledge and experience of mines and of the difficulties of dealing

1915

ATKINSON v. SHAW.

Lord Reading C.J.

with the accumulation of coal dust in mines, was of opinion that the adoption in the colliery of these methods of brushing or of compressed air blowing would not be effective in preventing the accumulation of coal dust, and he was further of opinion that they might conceivably under certain circumstances have been dangerous. I understand that to mean that this process would not collect the coal dust and prevent its particles from being disseminated throughout the atmosphere in the coal mine, but would have the contrary effect, and therefore that in his opinion it would indeed be dangerous. But it is said on behalf of the inspector there is an obligation imposed by the Act of Parliament under s. 62, sub-s. 3, which makes it necessary that steps should be taken, however impracticable they may be or appear and indeed however dangerous they may be. It is said that once Parliament has imposed the obligation there is a duty on every person to carry it out; if he fails to do so, it may be that a merely technical breach has been committed for which a nominal fine would be imposed, but that none the less there has been a breach of the Act of Parliament. But, assuming that compliance with the statutory direction as to the roof and sides would be more dangerous than to neglect the duty, it would lead to a curious state of things if provisions imposed for the protection of miners are to be applied so as to increase the dangers of the mine. But when we examine the Act of Parliament we find in s. 102, sub-s. 3, the provision that "nothing in this Act shall render the owner, agent, or manager of a mine liable to a penalty in respect of any contravention of or non-compliance with the provisions of this Act, if he proves that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision."

Now that sub-section applies to s. 62, sub-s. 3. I take its intention to be this: The Legislature was passing an Act to apply to all coal mines throughout the kingdom; these mines vary in character, and precautions which are salutary in one colliery may be highly dangerous in another. That is shown by the evidence in this case. Therefore Parliament, recognizing, when it imposed this obligation generally, that in some cases

performance of it might not be possible, provided that if the owner, agent, or manager can satisfy the magistrates that the contravention has happened through circumstances over which he had no control, or that it was impracticable for him to make the provisions demanded by the Act of Parliament, he is not to be liable to a penalty.

Now it seems clear that the justices were of opinion and have found as matter of fact that the respondent had done all that was reasonably practicable in the circumstances to prevent the accumulation of coal dust. They have stated in terms "that it was not practicable to carry out this provision of s. 62, sub-s. 3, in this particular mine." That brings us therefore to a case provided for under s. 102, sub-s. 3, and the magistrates, having come to the conclusion that it was not practicable to carry out the provisions of the Act in this respect, were perfectly right in deciding that the information should be dismissed.

AVORY J. I agree that this appeal must be dismissed. At first I was considerably impressed by the argument of Mr. Ivor Bowen, which appears to be the same as that presented to the justices, namely, that the duty imposed upon the respondent was a direct obligation and an absolute duty to systematically clear the roofs and sides of the roads in the colliery. It was suggested with some force that the words "as far as practicable" in s. 62, sub-s. 3, do not govern the duty to systematically clear, but that they only govern the words "so as to prevent coal dust accumulating." On further consideration I have come to the conclusion that that is a fallacious argument and that this sub-section ought really to be read as if it were in these words: "as far as practicable the floor, roof, and sides of the roads shall be systematically cleared of coal dust so as to prevent such coal dust accumulating." If it is read in that way, then this case is concluded by the findings of the justices that it was not practicable to carry out these provisions of s. 62 in this particular mine, and that the respondent had done all that was reasonably practicable in the circumstances to prevent coal dust accumulating. Those findings bring the respondent within s. 102, sub-s. 3, as my Lord has pointed out.

1915

ATKINSON v. SHAW.

Low J. I agree with both the judgments that have been delivered. We are bound by the findings of the justices, which appear to have been based upon evidence.

Appeal dismissed.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondent: *Bell, Brodrick & Gray, for C. & W. Kenshole & Prosser, Aberdare.*

W. H. G.

1915

May 17.

CIAMPA AND OTHERS *v.* BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

[1914 C. 368.]

Ship—Bill of Lading—Exceptions—Restraints of Princes—Any Circumstances beyond the Shipowner's Control—Cargo on Ship with Foul Bill of Health—Fumigation of Ship in accordance with French Law—Damage to Cargo—Unseaworthiness.

Lemons belonging to the plaintiffs were loaded on the defendants' steamship at Naples for carriage to London under a bill of lading which contained the exceptions "restraints of princes" and "any circumstances beyond the shipowner's control" and gave the ship liberty to call at any ports in the course of the voyage. The ship had come to Naples from Mombassa. After leaving Naples the ship proceeded to Marseilles, at which port, by reason of the fact that Mombassa was a plague contaminated port, and that the ship had a foul bill of health, the ship, in accordance with a decree of the French Government in force since 1906, was subjected by the port authorities to a process called "dératisation" which involved the pumping of sulphurous fumes into the ship's holds, in consequence of which the lemons arrived at their destination in a damaged condition :—

Held, (1.) that the defendants were not protected from liability for the damage by the above exceptions in the bill of lading; and (2.) that the fact that the ship would inevitably have to undergo at Marseilles the process of "dératisation," which would damage the lemons, caused her to be not reasonably fit at Naples for the carriage of the lemons, and that she was, therefore, unseaworthy.

ACTION in the commercial list tried by Rowlatt J. without a jury.

The plaintiffs claimed damages for breach of a contract for

1915

CIAMPA v. BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

the carriage of 108 boxes of lemons in the defendants' steamship the *Matiana*.

The lemons were shipped on the *Matiana* at Naples for carriage to London under a bill of lading dated January 13, 1914, which stated that the lemons had been shipped in good order and well conditioned and were to be carried and delivered, subject to the conditions contained in the bill of lading, in the like good order and well conditioned, at the Port of London. The exceptions in the bill of lading included (inter alia) "restraints of princes or rulers . . . . or any circumstances beyond the shipowner's control." The bill of lading gave liberty to the ship, before or after proceeding to the port of discharge, to proceed to and stay at any ports or places whatsoever, although out of or beyond the route to the port of discharge, for loading or discharging cargo or passengers or for any purpose whatsoever, all such ports or places to be deemed included within the intended voyage.

The *Matiana* was a vessel which traded in the East. Previously to calling at Naples she had in the ordinary course of her voyage called at the port of Mombassa. After leaving Naples with the plaintiffs' lemons on board, the *Matiana* proceeded to Marseilles. By a decree of the Ministry of the Interior, dated May 4, 1906, and given under the hand of the President of the French Republic, it was enacted that a process for the destruction of rats on board ships, called "dératisation," by means of sulphur fumigation should be compulsorily effected upon any vessel coming from or having called at a port considered to be contaminated by plague and seeking to obtain admission to the port of Marseilles. The *Matiana* had sailed from Mombassa with a foul bill of health and that port was considered by the French authorities to be contaminated with plague. On the arrival of the *Matiana* at Marseilles she was therefore compelled to undergo the process of "dératisation," which consisted in the pumping of sulphurous fumes through the holds of the ship. On the arrival of the *Matiana* at London it was found that the lemons had been damaged by the sulphurous fumes. In respect of the loss occasioned by this damage the plaintiffs claimed in this action.

The defendants pleaded in their defence that the loss occurred

1915

CIAMPA v. BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

by reason of excepted perils mentioned in the bill of lading, namely, restraints of princes or rulers, and circumstances beyond the defendants' control.

The plaintiffs by their reply alleged that the *Matiana* was unfit to carry the lemons and was thereby unseaworthy at the date of the shipment of the lemons at Naples in that the vessel was intended by the defendants, without the knowledge of the plaintiffs, to call at Marseilles, at which port the vessel was in the circumstances necessarily by French law exposed to the process of dératisation, which would in the natural sequence of causation, and did, damage the lemons.

It appeared from the evidence given on behalf of the plaintiffs that they did not know when they shipped the lemons on the *Matiana* that the ship would have to undergo the process of dératisation. A consignment of lemons shipped by the plaintiffs previously on a ship belonging to other shipowners had been damaged by dératisation of the ship, but the plaintiffs were not aware that that was the cause of the damage at the date of the shipment by the *Matiana*.

Evidence was given on behalf of the defendants that in the circumstances the ship was compelled to undergo dératisation at Marseilles. The defendants' ships had frequently been subjected to this process, and no damage to cargo had ever resulted from the sulphurous fumigation, but this was the first occasion on which the defendants had carried lemons in a ship which had to undergo dératisation.

Adair Roche, K.C., and *R. A. Wright*, for the plaintiffs. The facts of this case do not bring it within the exception, restraints of princes. That exception only applies to some exceptional and fortuitous circumstance, arising in the course of the voyage, which occasions the restraint: *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (1); *Miller* v. *Law Accident Insurance Co.* (2); *Finlay* v. *Liverpool and Great Western Steamship Co.* (3); *France, Fenwick & Co.* v. *Spackman.* (4) There was nothing fortuitous about the compulsory dératisation of this

(1) Post, p. 781
(2) [1903] 1 K. B. 712.
(3) (1870) 23 L. T. 251.
(4) (1912) 18 Com. Cas. 52.

ship at Marseilles. The French decree had been in force since 1906. The ship, as the defendants knew, had a foul bill of health. It was an inevitable result of these facts that the ship would under the French law have to be subjected to sulphurous fumigation at Marseilles. The defendants also rely on the exception "any circumstances beyond the shipowner's control," but a shipowner is not entitled to the protection of an exception which he has brought into operation by his own voluntary act: *Dunn* v. *Bucknall Brothers* (1); *Hill* v. *Idle*. (2) The defendants voluntarily sent their ship to Marseilles knowing what the consequences would be.

The plaintiffs are also entitled to succeed in this action on the ground that the ship was not seaworthy when the lemons were taken on board. A ship which is not reasonably fit to carry the particular cargo is not seaworthy: *Tattersall* v. *National Steamship Co.* (3); *Elderslie Steamship Co.* v. *Borthwick*. (4) When the defendants received the lemons on board the ship at Naples a state of facts existed to their knowledge which would render the ship liable to be fumigated with sulphur at Marseilles, the natural consequence of which would be that the ship would be rendered unfit for the carriage of lemons. The ship, therefore, was unseaworthy.

Maurice Hill, *K.C.*, and *A. Neilson*, for the defendants. "Restraints of princes" include more than an arrest or detention of a ship; in *Russell* v. *Niemann* (5) Byles J. said that that term covers "every case of interruption by lawful authority," and that "the three exceptions, the King's enemies, restraint of princes, and perils of the sea, seem to include every species of vis major." In *Miller* v. *Law Accident Insurance Co.* (6) the issue of a decree of the Argentine Government under which the landing of diseased cattle was prohibited was held to come within the words "restraints of peoples," and by clause 10 of the schedule to the Marine Insurance Act, 1906, "the term 'arrests, &c., of kings, princes, and people' refers to political or

(1) [1902] 2 K. B. 614.
(2) (1815) 4 Camp. 327.
(3) (1884) 12 Q. B. D. 297.
(4) [1905] A. C. 93.
(5) (1864) 17 C. B. (N.S.) 163; 34 L. J. (C.P.) 10, at p. 14.
(6) [1903] 1 K. B. 712.

1915

CIAMPA v. BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

executive acts, and does not include a loss caused by riot or by ordinary judicial process." By the terms of the bill of lading the defendants were entitled to send the ship to Marseilles and to discharge cargo there. The act of the French authorities in causing the ship to be fumigated, which caused the damage to the lemons, was just as much an executive act as was the prevention of the landing of the cattle in *Miller* v. *Law Accident Insurance Co.* (1) The exception "restraints of princes," therefore, protects the defendants from liability for the loss suffered by the plaintiffs. But if the facts do not constitute a "restraint of princes," the case is covered by the exception "any circumstances beyond the shipowner's control." The right of the defendants to discharge cargo at Marseilles could only be exercised subject to the obligation of having the ship fumigated. Knowledge that the process of fumigation would damage the lemons cannot be imputed to the defendants, for the evidence is that no cargo on their ships had ever before been damaged by that cause, and therefore the damage on this occasion must be regarded as being purely fortuitous and arising from a circumstance beyond the defendants' control.

As to the contention that the ship was unseaworthy, the warranty of seaworthiness only means that the ship must be reasonably fit, having regard to the nature of the cargo, to meet the ordinary incidents of the voyage. There is no suggestion that the ship was not seaworthy when the lemons were put on board at Naples, and it would be a serious extension of the meaning of unseaworthiness if it were held to arise from the happening of an entirely fortuitous occurrence after the voyage was in progress. It cannot be said that the fact that fumigation damages lemons is so notorious that shipping lemons on a ship which would subsequently undergo fumigation caused the ship, at the time of the shipment of the goods, to be not reasonably fit for their carriage.

Adair Roche, K.C., in reply. The question of seaworthiness does not depend on the extent of the defendants' knowledge as to the effect of fumigation on lemons, but on whether fumigation does in fact damage them, and that has been conclusively proved to be the case.

(1) [1903] 1 K. B. 712.

1915

CIAMPA v. BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

ROWLATT J. In my opinion the plaintiffs are entitled to succeed in this action on both of the grounds contended for by Mr. Roche. His first contention is that the loss does not come within the exceptions in the bill of lading which are relied on by the defendants, namely, "restraints of princes," and "any circumstances beyond the shipowner's control." The facts are that the defendants' ship had sailed from Mombassa with a foul bill of health, and therefore she would necessarily have to undergo the process of dératisation at Marseilles in accordance with the decree issued by the French Government, which decree had been in force since 1906. That decree provides in substance that a ship coming from a plague port and seeking admission into a French port is liable to the process of compulsory dératisation, except in certain circumstances which do not arise in this case. That being so, although there might be cases in which owing to the remissness of the French port authorities or by some accident a ship escaped the process, when the defendants' ship sailed from Mombassa and the other ports, including Naples, which she subsequently visited, she was beyond all doubt destined to undergo compulsorily the process of dératisation on her arrival at Marseilles. In these circumstances I do not think that the mere application at Marseilles of the French law to facts which existed before the ship sailed from Naples, which is the material transit, is a "restraint of princes" within the meaning of the exception in the bill of lading. I am not deciding that the application of the ordinary law of a country may not in some circumstances constitute a "restraint of princes," but I think the facts which bring that law into operation must be facts which have supervened after the ship has started on the voyage in question. When facts exist which show conclusively that the ship was inevitably doomed before the commencement of the voyage to become subject to a restraint, I do not think that there is a "restraint of princes."

That is a sufficient ground for deciding this case in favour of the plaintiffs, but I think that the plaintiffs are also right in saying that the ship was unseaworthy when the lemons were shipped on board at Naples. They were carried on the 'tween deck, where they became saturated with the sulphurous fumes

1915

CIAMPA v. BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

Rowlatt J.

used in the process of dératisation. They were not only spoilt in flavour, but were affected in substance also, being to a certain extent rotted. There is not much evidence as to this sort of thing having happened before, though the plaintiffs did prove that lemons belonging to them had been similarly damaged when being carried in a ship of another line about six months previously. On the other hand there is no evidence that lemons have ever passed through the ordeal of dératisation without becoming damaged; and the defendants do not appear to have carried lemons to Marseilles previously to this occasion. The only view of the evidence that I can take is that there was nothing fortuitous about the injury to the lemons on this particular occasion, and that lemons will not stand being exposed to sulphurous fumes. The defendants therefore received the lemons on board their ship for carriage, the ship being at the time free from sulphurous fumes, but circumstances existing which rendered it inevitable that the ship and cargo would in the course of the voyage be subjected to them. The ship was therefore in my opinion unfit to receive and carry the cargo. That is what is meant by unseaworthiness, quite apart from the fitness of the ship to traverse the ocean. I think, therefore, that the plaintiffs are also entitled to succeed on the ground that the ship was unseaworthy. It was also contended that the defendants themselves brought about this damage by taking the ship to Marseilles. I do not think it is necessary to go into that, as it is really the same point as that which arises as to the restraint of princes.

I give judgment for the plaintiffs for the amount claimed with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Waltons & Co.*

F. O. R.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
1915
Jan. 22; *Feb.* 1.
C. A.
Feb. 24 25, 26; *April* 23.

SANDAY & CO. *v.* BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Insurance (Marine)—Restraint of Princes—State of War—Whether Restraint necessarily involves Exertion of Force—Restraint imposed by Government of Assured—Constructive Total Loss of Goods—Destruction of Contemplated Adventure—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 60, *sub-s.* 1—"*Where the subject-matter insured is reasonably abandoned.*"

The plaintiffs, British merchants, shipped linseed on board two British ships in the River Plate for carriage to Hamburg. They had sold the linseed to German merchants on terms which left the property in the plaintiffs until delivery. They insured the linseed with the defendants at and from ports in the River Plate to Hamburg under policies in which the "subject-matter" was expressed to be "linseed valued at" a certain sum, and the perils insured against included "arrests, restraints, and detainments of all kings, princes, &c." While the goods were at sea war broke out between Great Britain and Germany. Of that fact the master of one of the ships received notice from his owners by cable in the course of the voyage, and in pursuance of orders to that effect put into a British port. The other ship on arrival in the Channel was signalled by a French cruiser to go into a British port, which she did, and the master there learnt that this country was at war with Germany. The Court was not agreed whether the action of the cruiser in so signalling was an order intended to be enforced, if necessary, or a piece of friendly advice. In consequence of the war the further prosecution of the voyages of both ships became illegal. The ships accordingly discharged the goods at ports in the United Kingdom, and, there being no prospect of the war terminating and the goods being forwarded to their German destination within a reasonable time, the plaintiffs gave to the defendants notice of abandonment and sued upon the policies as for a total loss.

By s. 60, sub-s. 1, of the Marine Insurance Act, 1906, "There is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable."

By r. 10 of the Rules for Construction of Policy in the schedule to the said Act, "The term 'arrests, &c., of kings, princes, and people' refers to political or executive acts, and does not include a loss caused by . . . . ordinary judicial process":—

Held by Lord Reading C.J. and Bray J. (Swinfen Eady L.J. dissenting), affirming the judgment of Bailhache J.,

1. That in a policy against restraints of princes the term "restraint" does not necessarily involve the actual use of physical force; it is

C. A.

1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

enough that the act alleged to be restrained is prohibited and that the State has the power to enforce the prohibition;

2. That a British policy against restraints of princes extends to a restraint imposed on the assured by the British Government, even though the assured is a British subject, provided the restraint is imposed for a cause other than a violation of law;

3. That the act of the British Government in being at war was a political act within r. 10, and that, as it brought into operation the prohibition of the common law against trading with the enemy, the inability of each ship to prosecute her voyage after the existence of a state of war had become known was caused by a "restraint of princes" within the meaning of the policy;

4. That the rule of the common law whereby the inability of goods shipped to reach their port of destination was treated as a constructive total loss of the goods has not been altered by the Marine Insurance Act, 1906; and that in a policy on goods on a voyage to a particular port the "subject-matter insured" within the meaning of s. 60, sub-s. 1, of that Act includes the arrival of the goods at that port notwithstanding that in the policy the "subject-matter" is expressed to be the goods and nothing more;

And that there was consequently a constructive total loss of the linseed on both the ships by a peril insured against and that the plaintiffs were entitled to recover.

THE plaintiffs were a British firm of merchants carrying on business in England. In July, 1914, they shipped parcels of 51,998 bags of linseed on board the British steamer *St. Andrew* at the ports of Rosario, San Nicholas, and Buenos Aires for carriage to Hamburg. Of these goods the plaintiffs had sold the linseed to German merchants at a price which covered cost, freight and insurance, but upon terms by which the property did not pass to the purchasers until delivery. By a policy of marine insurance dated July 31, 1914, the plaintiffs insured the linseed with the defendants, who are a British company, "at and from port or ports in the River Plate and/or tributaries to Hamburg," and it was thereby "agreed and declared that the subject-matter of this policy as between the insured and the said company so far as concerns this policy shall be and is as follows:—Linseed valued at 33,000*l*." The policy, which originally contained the usual "free from capture and seizure" clause, was expressed to be in consideration of a premium of 8*s*. 9*d*. per cent., but by an indorsement that clause was deleted and the premium was accordingly raised to 10*s*. per cent. Among the perils insured against were "takings

at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever." War broke out between Great Britain and Germany on August 4, and proclamations against trading with the enemy were issued by the British Government on August 5 and September 9. On August 9 as the *St. Andrew* was approaching the Lizard she was stopped by a French cruiser and told to go to Falmouth, and there her master received orders from a naval officer in authority to proceed to Liverpool to discharge, which he accordingly did. The master of the *St. Andrew* knew that war had been declared and if he had not been stopped by the French cruiser he would have signalled for orders at some Channel signalling station, probably the Lizard or the Start.

In July, 1914, the plaintiffs shipped another parcel of 17,898 bags of linseed at Rosario on board the British steamship *Orthia*, and by a policy of marine insurance also dated July 31 they insured the linseed with the defendants. The policy was in all respects in identical terms with the other except that the linseed was "valued at 11,000*l*."

On August 3 the owners of the *Orthia* received a telegram from the Admiralty in the following terms: "Admiralty suggest in the interests of the nation that your *Orthia* now bound for Hamburg with grain be diverted to a British port. Any further information is available at Trade Branch, War Staff, Admiralty."

On August 5, after the outbreak of war, they cabled to St. Vincent directing the *Orthia* to proceed to Glasgow. The *St. Andrew* arrived at Liverpool on August 11, and the *Orthia* at Glasgow on August 20, and they respectively discharged their cargoes. On September 7 the plaintiffs gave notice to the defendants abandoning the goods to them under both policies as a total loss. The defendants refused to accept the abandonment, but no objection was raised to the lateness of the notice. The linseed depreciated in value to the extent of some 25 per cent. There was in August no prospect of the linseed being able to be sent forward to Hamburg within any reasonable time.

The action came before Bailhache J. for trial without pleadings and upon admission of the above facts.

1915

SANDAY & CO. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Roche, K.C., and *Robertson Dunlop*, for the plaintiffs.
Leslie Scott, K.C., and *MacKinnon, K.C.*, for the defendants.

Cur. adv. vult.

Feb. 1. BAILHACHE J. (who delivered his judgment in writing) after stating the facts proceeded as follows: Upon these facts the plaintiffs submitted that there was a total loss of the linseed due to a peril insured against, namely, restraint of princes, and that the defendants were liable. The defendants denied liability on several grounds which may be summarized thus: (*a*) No loss, or, if a loss, not by a peril insured against. (*b*) The peril insured against was not the proximate cause of the loss. (*c*) If loss is alleged by takings at sea, arrests, or detainments by the British authorities, the policy does not insure against loss by such a cause. (*d*) After August 4 the adventure became illegal and the policy was therefore avoided.

There are two questions falling for decision in this case. First, was there a constructive total loss within the meaning of the policy? Second, if so, was such loss due to a peril insured against as its proximate cause? I shall try in answering these questions to cover the points raised by the defendants.

As to the first question it was conceded that in the case of a marine policy on goods the insurance is on the venture, and the loss of the venture constitutes a constructive total loss of the goods: see *Rodocanachi* v. *Elliott*. (1) This is not one of the instances of constructive total loss given in the Marine Insurance Act, 1906, but I think it is still the law. The venture in this case was clearly destroyed, and this point seems covered by the authority to which I have referred. There was a constructive total loss of the linseed.

Next, was such loss due to a peril insured against as the proximate cause of the loss? It will be convenient to divide this question into two parts and to discuss first whether the loss was in any sense due to a peril insured against. There is a slight difference between the incidents which led to the *St. Andrew* going first to Falmouth and then to Liverpool, and those which

(1) (1874) L. R. 9 C. P. 518.

led to the *Orthia* going to Glasgow, but it was not suggested that this difference makes any distinction in principle between the two cases, and in my opinion the two cargoes stand on the same footing. The voyage in both cases was lost because, by English law and by proclamations notifying the law, the further prosecution of the voyage became illegal, and the owners in both cases obeyed the law. Do these facts bring the case within the "restraint of princes" clause in the policies? No force was used, but "restraint of princes" does not necessarily involve the use of force; any authoritative prohibition on the part of a governing power, or the operation of municipal law, is sufficient: see *Miller* v. *Law Accident Insurance Co.* (1) In my judgment the loss of the venture in both cases was due to "restraint of princes." The defendants say, however, that even if this is so, yet as the restraint was by the operation of British municipal law, or by the authoritative act of the British Government in issuing their proclamations, it matters not which, such restraint is not covered by the policy. The reason they give is that in a British policy upon the goods of a British subject restraint by the British Government must always be taken to be excepted however wide-reaching the terms of the restraint clause may be. They say the clause should be construed as though after the words "of what nation, condition, or quality soever" there were added the words "other than British." This point is of importance, and as it is not I think covered by any decided case which can be said to be conclusive, I propose to consider it at some length. The words of the restraint clause are admittedly wide enough to cover acts of the British Government, and if they are not to have full effect given to them it must be because they have acquired some more limited meaning by custom, or because there is some ground of public policy which should prevent the Court giving them their full effect. No customary meaning was proved or suggested and I have failed to discover any ground of public policy. The question was discussed as long ago as 1702 in *Green* v. *Young* (2), where an embargo was laid by the British Government upon a vessel at Jamaica insured on a voyage from Jamaica to London. The vessel was seized

(1) [1903] 1 K. B. 712. (2) (1702) 2 Ld. Raym. 840.

1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY

Bailhache J.

and converted into a fire ship. The point was not actually decided, but Lord Holt, who tried the case, expressed the opinion that such embargo and seizure were covered under the restraint of princes clause. In 1802 in *Touteng* v. *Hubbard* (1), which was an action by a Swedish owner for freight due under a charterparty, Lord Alvanley in the course of his judgment quoted Marshall as saying on p. 437 "if a British ship be arrested or seized by the authority of the British Government from State necessity, this shall be a detention within the meaning of the policy for which the insurer is liable." Lord Alvanley discusses the point but expresses no decided opinion of his own. In the last edition of Arnould, par. 803, the law is thus stated: "There are two classes of cases in which loss may be occasioned by the public authoritative acts of the Government of the assured: those, viz., in which the assured and the underwriter are both subjects of the same State, and those in which they are subjects of different States. In the former class of cases it may now be taken as settled law that the underwriter is liable for all loss occasioned by the public acts of the home Government in detaining, arresting, or laying an embargo on the ship either in a home or a foreign port." And in the 3rd edition of Phillips on Insurance, par. 1109, under the heading "Capture, Arrests, Restraints and Detention," the restraints clause is set out as in these policies and the author says: "The policy extends to captures, arrests, and detentions by public enemies, by belligerents where the property insured is neutral, or by the Government of which the assured is a subject, for any other cause than a violation of law." These last words are very material; they do not appear in par. 803 of Arnould, who probably takes the qualification for granted. Incidentally they bring one to a further point taken by the defendants and supply the answer to it. They put their point in this way: "Even if the restraint clause in these policies does cover authoritative acts of the British Government at all, which we deny, it only covers those acts if they are illegal or mistaken," and for this I was referred to the case of *Lozano* v. *Janson*. (2) In that case the British ship *Newport* with a cargo on board

(1) (1802) 3 Bos. & P. 291. (2) (1859) 2 E. & E. 160.

belonging to a Brazilian subject, while on her voyage to Ambriz, and when near Ambriz, was seized by a Queen's ship under the statute 5 Geo. 4, c. 113, s. 4, as being illegally engaged in the slave trade. She was condemned by the local Court at St. Helena, and the shippers of the cargo, who were merchants in London and agents for the Brazilian consignee, were condemned in penalties amounting to double the value of the goods, and in costs. The ship and certain perishable goods were sold under order of the Court. The rest of the goods was detained by order of the Court at St. Helena. The cargo was insured at Lloyd's under a policy containing a restraint clause in the present form. On hearing of the proceedings at St. Helena, notice of abandonment was given in due time. The Privy Council on appeal reversed the order of the St. Helena Court and ordered restitution of ship and goods. Upon these facts it was held in an action against the defendant, the underwriter, that the seizure being wrongful, there was a loss of the goods by a peril insured against. It is to be noted that had the seizure been legal the owners of the *Newport* would have been guilty of a breach of English statute law and the policy would not have covered them. It was therefore necessary to hold that the seizure by the Queen's ship was illegal if the assured were to recover. This case is, in my view, no authority at all for the defendants' proposition, but merely illustrates the correctness of the statement by Phillips that the policy extends to captures by the Government of which the assured is a subject for any cause other than a violation of law. I may note in passing that I find that in the article on Insurance in the Laws of England on p. 443 it is submitted by the late Mr. Arthur Cohen that the case of *Lozano* v. *Janson* (1) only means that if the property insured is liable to arrest or detention by the British Government on account of some illegal act of the assured and is for that reason arrested or detained the assured cannot recover, and I am glad to have such high authority in support of my own view. In my judgment, therefore, the restraint clause, in the form in which it occurs in the policies before me, does cover the municipal law of this country and the authoritative acts of the

(1) 2 E. & E. 160.

1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Bailhache J.

British Government. I adopt the statement of the law by Phillips in the paragraph quoted above.

Another point taken for the defendants was that after the declaration of war the voyage became illegal and the policy ceased to be effective. Now there is no doubt that a British policy of insurance upon a venture, illegal according to English law at the time the policy is issued, is of no effect. No authority is now needed for this proposition. When, however, the venture is legal according to English law when the policy is issued, but becomes illegal during the currency of the policy by some municipal law or authoritative act of the Government, one must distinguish. If the assured persists in the venture after it has so become illegal, and as a consequence his goods are seized, he is uninsured. The seizure is due to his violation of English law. If, however, in consequence of such supervening illegality he abandons the venture and thereby suffers loss, that loss, if I am right in my judgment, so far falls within the restraint of princes clause, and, apart from any possible question of causa proxima, the assured is covered. If it were not so an assured would indeed be in a sorry plight, for whether he obeyed or disobeyed the law he would equally be uninsured. In my opinion he is not in this position, and I take the law to be that a British subject does under a restraint clause in the present form insure himself against loss caused by a compliance with the law of his country or the commands of his Government, although he cannot and does not insure himself against a loss caused by a defiance of such law or commands.

One last point remains: Was the restraint of princes the proximate cause of the loss? The defendants say no and refer me to a line of cases of which *Hadkinson* v. *Robinson* (1) is an early example, and *Kacianoff* v. *China Traders Insurance Co.* (2) is I think the latest. The plaintiffs on the other hand refer me to *Miller* v. *Law Accident Insurance Co.* (3) It is, I think, correct to say that the *Hadkinson* v. *Robinson* (1) line of cases proceeds upon the principle that a loss which arises from steps taken to avoid a peril cannot be said to be due to the peril so

(1) (1803) 3 Bos. & P. 388. (2) [1914] 3 K. B. 1121.
(3) [1903] 1 K. B. 712.

avoided. In deciding within which set of authorities a given case falls it must always be borne in mind that much depends upon the character and description of the particular peril which has to be alleged and relied upon as the cause of the loss. In this case the restraint took the form of the common law, which upon the outbreak of war sprang automatically into force, and of the commands issued by proclamation. One of these was an injunction to shipowners "not to permit any British ship to leave for, enter, or communicate with any port or place of the German Empire." When once it is admitted that force is not necessary to constitute restraint of princes it is clear that a shipowner who keeps his vessel at home or diverts her to a home port in obedience to such a proclamation is not taking steps to avoid that particular peril, but is submitting to its operation. In such a case restraint of princes is the proximate cause of loss. If on the other hand he acted in precisely the same way in order to avoid capture, and if the only peril insured against of which he could avail himself against his underwriter was seizure or capture, then *Hadkinson* v. *Robinson* (1) and cases of that class decide that as his vessel has not in fact been captured he cannot rely upon capture as the cause of loss. In my opinion this case falls within the principle of *Miller's Case* (2) and restraint of princes was the proximate cause of the loss.

I have come to the conclusion that there was a constructive total loss of the linseed on both steamers, that the proximate cause of the loss was a restraint of princes within the meaning of the policies, and my judgment must be for the plaintiffs with costs.

Judgment for plaintiffs.

The defendants appealed.

Feb. 24. *Sir Robert Finlay, K.C., Leslie Scott, K.C.*, and *MacKinnon, K.C.*, for the appellants. In this case two questions are involved: first, whether the ships were prevented from prosecuting their voyage by a restraint of princes, and secondly, whether the plaintiffs have incurred a total loss. It is not

(1) 3 Bos. & P. 388. (2) [1903] 1 K. B. 712.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

disputed that as soon as it came to the knowledge of the master that war had broken out it became illegal to prosecute the voyage further: *Esposito* v. *Bowden*. (1) That that is the rule of the common law is established by that case beyond all doubt. But there is no case which shows that the abandonment of a voyage by reason of a state of war rendering it illegal to continue it is a loss by restraint of princes. It is a loss resulting from the operation of the ordinary criminal law of the land. A voyage abandoned under voluntary obedience to the law of England by an English subject is not the same thing as a voyage prevented by "restraint of princes," &c., and the fact that behind the law is the sanction of criminal proceedings or the condemnation of the ship or cargo by the Prize Court, with the possible use of force for either purpose, makes no difference; the voyage is abandoned by a voluntary act. The sanction behind the law is not force. Acts done in voluntary obedience to the ordinary law of the land do not amount to "restraint of princes," &c., and do not operate directly or indirectly on the subject-matter of the insurance. To constitute a "restraint" there must be an exertion of force. In *Finlay* v. *Liverpool and Great Western Steamship Co.* (2) Martin B. said: "The 'acts and restraints of princes and rulers,' mentioned and provided against in the bill of lading, have reference to the forcible interference of a State or of the Government of a country taking possession of the goods manu forti." The judgment of Bailhache J. was mainly rested upon the case of *Miller* v. *Law Accident Insurance Co.* (3), in which the Court of Appeal reversed so much of the judgment of Bigham J. in the Court below (4) as decided that the mere operation of the ordinary municipal law of the land is not a restraint of princes or people. But that reversal is to be explained by the difference in the view of the facts taken by the Court of Appeal (3): see the judgment of Stirling L.J. at p. 721. In the present case the plaintiffs turned aside from the adventure before any restraint of princes could operate. They turned aside voluntarily to avoid the peril, and therefore the peril did not cause the loss: *Hadkinson* v.

(1) (1857) 7 E. & B. 763.
(2) (1870) 23 L. T. 251, at p. 254.
(3) [1903] 1 K. B. 712.
(4) [1902] 2 K. B. 694.

Robinson (1); *Lubbock* v. *Rowcroft* (2); *Forster* v. *Christie* (3); *Kacianoff* v. *China Traders Insurance Co.* (4) The restraint must "act directly and not collaterally upon the thing insured": per Lord Alvanley C.J., *Hadkinson* v. *Robinson.* (5) But even if the declaration of war did operate as a restraint it was that of the British Government, and on grounds of public policy it ought not to be held covered by the insurance: *Touteng* v *Hubbard* (6); *Lubbock* v. *Potts* (7); *Lozano* v. *Janson.* (8)

Secondly, assuming that the abandonment of the voyage was caused by a restraint of princes, that abandonment did not involve a constructive total loss of the goods. If there was any rule of the common law which would have made it a constructive total loss, that rule has been superseded and set aside by the Marine Insurance Act, 1906, ss. 56 and 60, as being inconsistent with the express provisions of the Act within the meaning of s. 91, sub-s. 2.

Sect. 60 deals with "constructive total loss," and for the purposes of constructive total loss the ship and goods are dealt with together and are both placed on the same footing, and the three events specified in sub-s. 2 (i.), (ii.), and (iii.) are now the only events in which there can be a constructive total loss. Those events are exhaustive and are not merely particular instances of a wider rule. Not one of those events is applicable to the present case. Previously to the Act there were two sets of decisions, under one of which it was held that the loss of the season, or loss of voyage, would not amount to constructive total loss of the goods, for instance *Anderson* v. *Wallis* (9); *Hunt* v. *Royal Exchange Assurance* (10); while under the other set it was held that anything like a prolonged detention might amount to constructive total loss as frustrating the object of the voyage, for instance *Barker* v. *Blakes* (11); *Cologan* v. *London Assurance Co.* (12); *Roux* v. *Salvador* (13); *Lozano* v. *Janson* (14); and

(1) 3 Bos. & P. 388.
(2) (1803) 5 Esp. 50.
(3) (1809) 11 East, 205.
(4) [1914] 3 K. B. 1121.
(5) 3 Bos. & P. at p. 393.
(6) 3 Bos. & P. 291.
(7) (1806) 7 East, 449.
(8) 2 E. & E. 160, at p. 176.
(9) (1813) 2 M. & S. 240.
(10) (1816) 5 M. & S. 47.
(11) (1808) 9 East, 283.
(12) (1816) 5 M. & S. 447.
(13) (1836) 3 Bing. N. C. 266.
(14) 2 E. & E. 160.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Rodocanachi v. *Elliott.*(1) But the conflict between those two sets of decisions has been put an end to by the Marine Insurance Act, 1906, by which the Legislature has advisedly cut out this old common law head of constructive total loss based on the destruction of the contemplated adventure, which was very difficult of application and open to great uncertainty; and in *Polurrian Steamship Co.* v. *Young* (2) the Court of Appeal has interpreted the Act of 1906 in a manner inconsistent with the old common law. Further, the ship and goods are both dealt with in the same manner and on the same footing in s. 60. It has always been abundantly clear that loss of voyage cannot make a constructive loss of the ship on a policy on the ship only: *Pole* v. *Fitzgerald* (3); *Parsons* v. *Scott* (4); *Falkner* v. *Ritchie* (5); *Doyle* v. *Dallas* (6); and that being so with regard to the ship, the same doctrine now, by virtue of s. 60, applies equally to the goods. There is nothing in the section to show that loss of voyage has anything more to do with loss of goods than it has to do with loss of ship. Moreover, loss of voyage can easily be insured against, and s. 3, sub-s. 2 (*b*), of the Act refers in express terms to this head of insurance. This policy clearly indicates that the subject-matter insured was the goods, and only the goods. The policy does not in terms cover insurance against loss of the profits of the voyage, and on this point s. 16 and s. 23, sub-s. 2, of the Act are material, the latter section providing that "a marine policy must specify . . . . the subject-matter insured." In the present case the loss never appeared to be unavoidable; the goods were never in danger; the assured were never deprived of the possession of the ship or goods by a peril insured against or otherwise; and it was never unlikely that they could recover the ship or goods. Under these circumstances the failure of the goods to arrive at their destination cannot be treated as a constructive total loss.

Roche, K.C., and *Robertson Dunlop*, for the respondents. From the moment of the declaration of war by the Sovereign that act of State was a political or executive act carrying with it

(1) L. R. 9 C. P. 518.
(2) [1915] 1 K. B. 922.
(3) (1750) Willes, 641.
(4) (1810) 2 Taunt. 363, 373.
(5) (1814) 2 M. & S. 290.
(6) (1831) 1 Moo. & R. 48.

all the force of law: *Esposito* v. *Bowden*. (1) It forbade trading with the enemy and operated directly on the ship's owner and the ship's cargo. The voyage to Germany became at once illegal, and the prosecution of any illegal adventure is a ground for the confiscation of the ship—*The Hoop* (2)—and knowledge is immaterial. The term "restraint of princes" has been much considered in cases dealing with charterparties, and for this purpose there is no difference in principle between charterparties and policies of insurance: per Bovill C.J. in *Rodocanachi* v. *Elliott*. (3) A specific or direct action on the goods themselves is not necessary to constitute a restraint: *Rodocanachi* v. *Elliott* (4); *Geipel* v. *Smith* (5); *Nobel's Explosives Co.* v. *Jenkins & Co.* (6); *Touteng* v. *Hubbard* (7); *The Progreso* (8); and the employment of actual force is not necessary: *Miller* v. *Law Accident Insurance Co.* (9) The appellants' whole argument on this point is based on the dictum of Martin B. in *Finlay* v. *Liverpool and Great Western Steamship Co.* (10), but that case differed from this inasmuch as it involved the normal operation of pre-existing rules, whereas "perils" connote something fortuitous. The dictum of Martin B. came under review in *Miller* v. *Law Accident Insurance Co.* (9), and so far as this particular question is concerned this is really an appeal against the decision in that case. Since that decision the Marine Insurance Act, 1906, has been passed, and r. 10 in the First Schedule to the Act clearly covers this case. It makes no difference that the act of State constituting the restraint was an act of the British Government. The policy does not exclude acts of the British Government and there can be nothing against public policy in its application to them: *Lubbock* v. *Potts* (11); *Barker* v. *Blakes* (12); Park on Marine Insurance, 8th ed., p. 175.

The next question to be determined is whether, assuming the restraint of the law of the land to amount to a restraint of princes, it acted directly and not collaterally upon the thing

(1) 7 E. & B. 763.
(2) (1799) 1 C. Rob. 196.
(3) L. R. 8 C. P. 649, 666.
(4) L. R. 9 C. P. 518, 522.
(5) (1872) L. R. 7 Q. B. 404, 410.
(6) [1896] 2 Q. B. 326, 331.
(7) 3 Bos. & P. 291.
(8) (1892) 50 Fed. Rep. 835.
(9) [1903] 1 K. B. 712.
(10) 23 L. T. 254.
(11) 7 East, 449, 451.
(12) 9 East, 283.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

insured. That is a mere question of fact, as to which the line would probably be drawn differently at the present day from what it would in former times. The master in putting into the English port was submitting to the restraint. It would be against public policy to say that, to constitute a restraint, the person restrained must resist the law. It is enough that it is the law and is capable of being enforced.

The last point is whether there was a total loss at all. It was a well-settled rule of the common law that a loss of the venture was a loss of the goods, or that, as some of the authorities put it, an insurance of goods, though nothing more was said in the policy, was an insurance of the venture. Goods sold which cannot reach their destination lose their commercial character. The percentage of their depreciation arising from their inability to do so has nothing to do with the case, the subject-matter of the insurance being the venture. The rule is so stated in Phillips on Insurance, 3rd ed., s. 1620: "An embargo, or other arrest or detention, evidently intended for only a short duration, does not give a right to abandon, but if it purports to be for a long or indefinite continuance, it is such a breaking up of a voyage, or interference with the use and control of the subject insured, as constitutes a constructive total loss." The period of a war is always assumed to be indefinite. In *Barker* v. *Blakes* (1) Lord Ellenborough said: "In order to entitle himself to recover as for a total loss, the plaintiff must establish two things: first, that a loss of the voyage (the only description of loss which can be contended for in this case, as the goods themselves have been ordered to be restored, and are capable of being so) was occasioned by the detention in question." In *Anderson* v. *Wallis* (2), where a ship had been detained by necessary repairs so long that the goods were unable to reach their destination that season, it was held that the detention was not long enough to constitute a total loss, but the principle was there recognized that a long detention would do so. In *Cologan* v. *London Assurance Co.* (3) the assured was held entitled to treat the goods as totally lost

(1) 9 East, 283, at p. 293. (2) 2 M. & S. 240.
(3) 5 M. & S. 447.

although in fact they were afterwards shipped somewhere else. Subsequent events do not get rid of the fact of the loss of the particular voyage. In *Roux* v. *Salvador* (1) the hides which were the subject of the policy were so damaged by sea water that they would have ceased to exist as hides by reason of putrefaction if the voyage had been completed, and they were sold at an intermediate port to prevent that result. It was held that the assured might recover as for a total loss. That involves the conclusion that what was insured was the arrival of the goods at their destination. In *Rodocanachi* v. *Elliott* (2), where goods were insured under a marine policy covering risks during a portion of the transit overland, and they were detained in Paris while it was besieged by the Germans, it was held that as the goods were lost to the assured for an indefinite time they might recover as for a total loss. Bramwell B. in delivering the judgment of the Exchequer Chamber said: "It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, 'to a destruction of the contemplated adventure.'" In *Mansell* v. *Hoade* (3), where cattle were insured on a voyage to Buenos Aires and on arrival were not allowed to be landed by order of the Argentine Government on account of some of the cattle suffering from disease, they were taken out to sea and slaughtered. But as it appeared that it was not impossible that the difficulty of landing them might have been got over, it was held that there was not an actual total loss, but only a constructive total loss, and consequently as the assured had omitted to give notice of abandonment they could not recover. This rule has not been altered by the Marine Insurance Act 1906. The effect of ss. 57 and 60 is that if under the circumstances which have arisen the goods insured cannot possibly ever reach their destination there is an actual total loss; if the prevention of their reaching it appears to be unavoidable there is a constructive total loss. The examples of constructive total loss given in s. 60, sub-s. 2, are not intended to be exhaustive.

(1) 3 Bing. N. C. 266. (2) L. R. 9 C. P. 518.
(3) (1903) 20 Times L. R. 150.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

There is no express provision in the Act inconsistent with the rule of the common law that an insurance of the goods is an insurance of the voyage; therefore s. 91, sub-s. 2, preserves that rule. [They also referred to *Hall* v. *Hayman* (1); *Angel* v. *Merchants Marine Insurance Co.* (2); *Macbeth* v. *Maritime Insurance Co.* (3); *Polurrian Steamship Co.* v. *Young.* (4)]

Sir Robert Finlay, K.C., in reply. The contention that the act of the prince in declaring war was the cause of the abandonment of the voyage is fallacious. The restraint was due to the municipal law which forbade trading with the enemy as soon as the war began; it was a restraint which already existed before the commencement of the war. It was independent of any declaration of war. The same result would happen if there were war without any declaration of war by the Sovereign. The existence of a state of war was merely the occasion for the operation of the restraint, not its cause. The mere breaking out of war is not insured against by such a policy as this. There is a special form of policy which deals with that risk, but a much higher premium is charged for it. It is not correct to say that it was a well settled rule of the common law that a loss of the venture was a loss of the goods. In *Lozano* v. *Janson* (5) Lord Campbell said: "It has often been held that, if the ultimate consequence of a peril insured against is merely the loss of a voyage or a suspension or retardation of a mercantile adventure, although a notice of abandonment had been justifiably given, a total loss cannot be claimed." There were authorities both ways, and s. 60 of the Marine Insurance Act, 1906, was designed to get rid of the conflict. Though the Act is entitled "An Act to codify the Law relating to Marine Insurance," it was not intended to be merely a code of the existing law, any more than the Bills of Exchange Act, 1882, which was also entitled "An Act to codify the Law" &c., but was held in *Bank of England* v. *Vagliano Brothers* (6) to have altered the law. In that case Lord Herschell, dealing with the

(1) [1912] 2 K. B. 5.
(2) [1903] 1 K. B. 811.
(3) [1908] A. C. 144.
(4) [1915] 1 K. B. 922.
(5) 2 E. & E. 160, at p. 177.
(6) [1891] A. C. 107.

mode of construing a codifying Act, said (1): "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." So construed the words of the present Act are plain. A constructive total loss arises where "the subject matter insured" is reasonably abandoned. Here the subject-matter insured is the goods; the policy in terms says so; whereas the other side wish the policy to be read as if it stated the subject-matter to be the goods and the voyage.

Cur. adv. vult.

April 23. LORD READING C.J. read the following judgment:— The plaintiffs bring this action to recover the value of two cargoes owned by them and shipped at ports in the River Plate in the steamships *Orthia* and *St. Andrew* for carriage to Hamburg. The cargoes were insured by the plaintiffs with the defendants under two policies of marine insurance subscribed by the defendants, and the question is whether the plaintiffs are entitled in the circumstances of this case to recover from the defendants the values named in the policies. Bailhache J. tried the action and decided in favour of the plaintiffs, and the defendants appeal from that judgment.

The plaintiffs are corn merchants carrying on business in this country and had contracted to sell and deliver to German merchants resident in Hamburg in the Empire of Germany two parcels of linseed; the price covered cost, freight, and insurance, but the property was not to pass until the goods were delivered at Hamburg. The linseed was shipped in the month of July on the steamships *Orthia* and *St. Andrew* for carriage from the River Plate to Hamburg. A small parcel of wheat was also shipped in the *St. Andrew* which the plaintiffs intended to sell to German firms at Hamburg. War was declared on August 4, 1914, at 11 P.M.

(1) [1891] A. C. at p. 144.

C. A. 1915

SANDAY & CO. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Lord Reading C.J.

by His Majesty the King against the Emperor of Germany. On August 3 the owners of the *Orthia* received a telegram from the Admiralty suggesting that in the interests of the nation the vessel should be diverted to a British port. On August 5 the owners cabled to St. Vincent directing the *Orthia* to proceed to Glasgow. On August 7 the *Orthia* called at St. Vincent for orders, received the message from the owners, and in consequence proceeded to Glasgow, where she arrived on August 20 and duly discharged the linseed.

On August 9 the *St. Andrew* was forty miles S.S.W. of the Lizard, proceeding on her voyage to Hamburg, when a French cruiser signalled her to stop and asked whither she was going. The master replied "To the Lizard." At that time he did not know that we were at war with Germany, although he was aware that France and Germany were at war. The cruiser signalled her "For security go into Port Liverpool." This was an obvious mistake, as Port Liverpool is in Canada, and the cruiser then signalled her to go into Falmouth. The *St. Andrew* then proceeded to Falmouth, and when there learnt that this country was at war with Germany. About an hour or two after dropping anchor at Falmouth the master received orders through the examining officer at Falmouth from the chief naval transport officer at Devonport to go to Liverpool, whither he proceeded, and upon arrival on August 11 duly discharged the linseed and the wheat. Both the plaintiffs and the defendants are British subjects, and the *Orthia* and *St. Andrew* are British steamships.

By the policies of insurance the shipments of linseed and wheat were insured upon a voyage "at or from port or ports in the River Plate and tributaries to Hamburg" against loss by perils including the peril of "takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition, or quality soever." The printed form of the policy contained the common form of the f.c.s. clause, "Warranted free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war." This clause was deleted on payment of an extra premium. The policies were warranted free from

particular average except in circumstances which have not arisen. The value of the cargoes was depreciated to the extent at most of some 25 per cent. On September 7 the plaintiffs gave notice of abandonment to the defendants, who refused to accept abandonment, whereupon the plaintiffs brought this action. It is agreed that no point should be made as to the date of the notice. By reason of the war the vessels could not lawfully continue the voyage to Germany, and, so far as the human mind could foretell, the linseed could not be forwarded to Germany within reasonable time. On these facts, which were not in dispute, Bailhache J. held that the linseed had been lost owing to restraint of kings and princes, and that the underwriters were liable for a total loss under the terms of the policies. The learned judge drew no distinction between the shipments of the *Orthia* and the *St. Andrew* and held that "the voyage in both cases was lost because, by English law and by proclamations notifying the law, the further prosecution of the voyage became illegal, and the owners in both cases obeyed the law." There is no doubt that the *Orthia* proceeded to Glasgow instead of continuing her voyage to Hamburg because of the orders received from the owners of the vessel, who were aware of the existence of a state of war between this country and Germany. The case of the *St. Andrew* is not quite so simple. She was advised by the French cruiser to run into Falmouth for security. The action of the French cruiser was not a hostile intervention and there was no exercise of force or threat to exercise it. The master of the vessel knew that the voyage to Germany had become illegal and must be abandoned before he received the orders of the Admiralty to proceed to Liverpool. Upon these facts I agree with the learned judge that the shipments in the two vessels stand, for the purpose of the decision in this case, in the same position.

The question to be determined is whether the abandonment of the voyage, in consequence of its having become illegal, was an abandonment caused by "restraint of kings and princes" within the meaning of the policy. The defendants contend, first, that there was no act of restraint, and, secondly, that the restraint did not cause the loss. On the first point they argue that the word "restraint" implies an act of intervention by force, manu

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Lord Reading C.J.

forti, and that as no force or violence had been exerted to prevent the continuance of the voyage there was no restraint. Must force be actually exerted before there can be a "restraint of kings and princes"? There is no special meaning attributable to these words, either by custom or usage among merchants, and they must be construed according to their natural and ordinary meaning. They find their place in this policy at the end of a long series of enumerated perils, all of which contemplate a loss by the intervention of some fortuitous occurrence. By r. 7 of the Rules for Construction of Policy "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of wind and waves." The words "arrests, restraints and detainments of all kings, princes and people" to my mind also imply some intervention of a fortuitous character, some interference out of the ordinary course of events by the governing authorities who have the force of the State behind them to compel submission to their authoritative decrees. In *Rodocanachi* v. *Elliott* (1) Brett J. in construing the words "restraints and detainments of all kings, princes and people" said: "Now, I apprehend that goods are restrained or detained where they are by the application of a hostile force prevented from being carried to their destination. That that applies to embargo there seems to me to be no doubt; and there is equally, in my opinion, no doubt that it applies to blockade; in both it is intended that the ship or goods shall not be removed." In that case the Court had only to consider restraint or detainment by a hostile force. The conclusion is that there was restraint or detainment because by the action of the German army, then besieging and investing Paris, the goods were prevented from leaving Paris and reaching their destination. In that case it was argued that there was no loss of goods by restraint of princes because there had been no action on the goods themselves, but Bramwell B., in delivering the judgment of the Exchequer Chamber, rejected that argument and observed that the word "restraint" is "more properly applicable to persons than to goods, so that a restraint of goods means a restraint of those having the custody of goods," and held that

(1) L. R. 8 C. P. 649, at p. 670.

the goods, having been effectually prevented from coming out of Paris by reason of the siege and investment of Paris by the Germans, were lost by restraint of princes. (1) The same words are to be found in the exception clauses of charterparties and bills of lading, and, although the points decided are not the same as in the present case, the construction of the words must be the same whether they are found in charterparties or bills of lading or in policies of marine insurance. In *Geipel* v. *Smith* (2) the question was whether the defendant was justified in determining the contract by reason of the blockade at the port of discharge; Cockburn C.J. thus answered it at p. 410: "Is a blockade a restraint of princes? I think it is. It is an act of a sovereign State or prince; and it is a restraint, provided the blockade is effective; and in the eye of the law a blockade is effective if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through. In such a case the obstacle arises from an act of State of one of the belligerent sovereigns, and consequently constitutes a restraint of princes. The case, therefore, is brought within the exception of the charterparty." Rule 10 of the Rules for Construction of Policy in the First Schedule of the Marine Insurance Act, 1906, confirms the view I have expressed as to the meaning of "restraint." The rule is in the following words: "The term 'arrests &c. of kings and princes and people' refers to political or executive acts and does not include a loss caused by riot or by ordinary judicial process." Acts of State are clearly included; a declaration of war by the Sovereign is an act of State and is a political or executive act. "The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's license. As an act of State, done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law": *Esposito* v. *Bowden*. (3) Whether war is declared by or against the Sovereign or at all is immaterial for the purpose under consideration. It is equally an act of State

(1) L. R. 9 C. P. at pp. 522, 523. (2) L. R. 7 Q. B. 404.
(3) 7 E. & B. 763, at p. 781.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Lord Reading C.J.

if the forces of the Crown are used by order of the Crown against the enemy. A political or executive act may, however, be an act of interference and of forcible interference notwithstanding that force is not actually exerted. The Executive has the power of compelling obedience to its orders by the exercise of force if necessary; the force need not be actually physically present when the master of the vessel submits to an order of the Executive. The master acts in obedience to such an order without requiring the exertion of force to coerce him into submission, because it would be useless to refuse to submit. In my opinion it is not necessary that an actual exertion of force should be made to constitute a restraint. Such judicial authority as exists supports this view and is against the defendants' contention that actual force must be used. They relied upon the dictum of Martin B. in *Finlay* v. *Liverpool and Great Western Steamship Co.* (1) There it was held that an order by a Court of competent jurisdiction in New York to the defendants to deliver up goods was no answer to a claim for non-delivery of goods in accordance with the terms of the bill of lading and was not an act within the exception in the bill of lading of "restraint of princes." Martin B. said that these words "have reference to the forcible interference of a State or of the Government of a country taking possession of the goods manu forti, and do not extend to the legal proceedings which, it is alleged in the plea, afterwards took place in the Courts of New York." It is to be observed that Martin B. did not express the view that there must be actual physical exertion of force. This dictum came under review in *Miller* v. *Law Accident Insurance Co.* (2), where the question arose whether the operation of the municipal law of a country which prevented the delivery of goods at their port of destination was a restraint of princes within the meaning of the policy. As the plaintiffs maintain that the decision of the Court of Appeal in that case covers the present case it is necessary closely to examine the facts and judgments. The plaintiff had shipped a number of bulls in the steamship *Bellevue* to be carried from Liverpool to Buenos Aires, and then effected a policy of insurance on the animals. Months before the date of the shipment the Argentine

(1) 23 L. T. at p. 254. (2) [1902] 2 K. B. 694.

Government had passed a decree forbidding the entry of animals suffering from contagious diseases. By article 5 of the decree it was provided that animals suspected of being affected with diseases should be slaughtered. The *Bellevue* arrived on September 10, 1900, and after inspection of the animals by Argentine officials the Ministry of Agriculture ordered the vessel to leave the port, but gave leave to tranship the cattle to another vessel outside the limits of the port. On September 11, 1900, a general order was issued by the Ministry forbidding the discharge of cattle from the United Kingdom. The *Bellevue* left the port and transhipped the cattle. The plaintiffs demanded to recover against the underwriters on the ground that there had been a restraint of princes. Bigham J. decided that the mere operation of an ordinary municipal law was not a restraint within the meaning of the policy. He quoted the dictum of Martin B. in *Finlay* v. *Liverpool and Great Western Steamship Co.* (1) and said: "So in the present case the words do not in my opinion cover the operation of the ordinary law of the land but relate only to some violent departure from the ordinary course of things." He held that *Rodocanachi* v. *Elliott* (2) was distinguishable because in that case, although there was neither actual seizure nor arrest of the goods, nor a specific order preventing the goods leaving the besieged city, the goods were as effectually prevented leaving the city as if they had been actually seized by the German army; whereas in the case before him no force of any kind was used, the captain was only required to obey the ordinary law existing in the country at the time when the goods arrived, and he obeyed it. The Court of Appeal (3) differed from Bigham J. and held that there was an active intervention of the Government which came within the "restraint of princes." They dissented from the view that direct force must be applied to bring the peril of restraint of princes into operation. Stirling L.J. at p. 720 said: "There was an active intervention of the Government of the Argentine Republic, which was none the less an exercise of superior force because no officer of the army or the police force intervened." Mathew L.J. pointed out

(1) 23 L. T. 251. (2) L. R. 9 C. P. 518.

(3) [1903] 1 K. B. 712.

C. A. 1915

SANDAY & CO. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Lord Reading C.J.

that *Finlay* v. *Liverpool and Great Western Steamship Co.* (1) was not an authority for the proposition that there must be an exercise of direct force to constitute restraint. He treated the acts of the executive authorities at Buenos Aires as acts of restraint of princes and said: "If actual force was not used it was because there was no opposition. The master submitted to the orders of the administration. The result to the assured was the same as if force had been used." I think the decree of September 11 was in itself sufficient ground for the decision. There was a definite act of intervention by the State, it was an act done by a superior authority supported by the force of the State; it mattered not whether it was a legal or an illegal act, the captain was bound to obey the decree and therefore was acting under the restraint of the rulers of the country notwithstanding that no direct force was exerted. This case is an authority tending to support the plaintiffs' main contention, and in any event decides that direct force need not be used to constitute restraint: see also *Mansell* v. *Hoade.* (2) In the present case the plaintiffs contend that the declaration of war is an act of State which immediately and automatically forbade trading with the enemy and made the master, and all those who became responsible for the continuance of the voyage to the enemy country, amenable to the criminal law. The masters and owners of the vessels, being subjects of the King, were bound to conform to the law which sprang into operation at the moment we became engaged in war with Germany. The Royal Proclamation of August 5 did not make the law; it notified it to the public and warned them against breach of the law. Is the loss of the voyage by submission to the municipal law the direct consequence of the act of State and therefore a loss by restraint of kings and princes? Such a loss of voyage is not, in my judgment, a loss by "ordinary judicial process." That phrase is used to denote proceedings in a Court of law such as arose, for example, in *Finlay* v. *Liverpool and Great Western Steamship Co.* (1), and r. 10 is so expressed as to give effect to the distinction drawn in that case between acts of

(1) 23 L. T. 251. (2) 20 Times L. R. 150, per Walton J.

C. A.
1915
SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.
Lord Reading C.J.

intervention by a governing authority and acts under ordinary judicial process of the Courts.

I have no doubt that the state of war is a political or executive act, but for the plaintiffs to succeed the loss must be not only the consequence, but the direct consequence, of that act; in other words, the restraint must be the proximate cause of the loss. For the defendants reliance was placed upon a line of cases of which *Hadkinson* v. *Robinson* (1) is the leading authority. That action was brought on a policy of insurance upon a cargo of pilchards at and from a port in Cornwall to Naples. After the vessel had proceeded on her voyage with the pilchards on board it was ascertained that the port of Naples was shut against all British ships. The vessel was sailing under convoy and was ordered by the commodore to make a port in Minorca, where she duly arrived and the cargo was sold. The plaintiff gave notice of abandonment and demanded payment for a total loss. The vessel could not have proceeded to the port of Naples without running the risk of confiscation by the Government of Naples. Lord Alvanley C.J., delivering the judgment of the Court, said: "It has appeared to me that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured. . . . . The doctrine" (that the assured might abandon in respect of a loss of voyage) "is only applicable to cases in which the loss is occasioned by a peril insured against; which, as it appears to me, must be a peril acting on a subject insured immediately, and not circuitously, as in the present case." This case was decided upon the principle that the peril insured against must be the proximate cause of the loss, and that if the master diverted the voyage or stayed in port to avoid coming under the operation of the peril, the vessel cannot have suffered loss by the peril. See also *Kacianoff* v. *China Traders Insurance Co.* (2) A similar point arose before Lord Ellenborough in

(1) 3 Bos. & P. 388.

(2) [1914] 3 K. B. 1121.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Lord Reading C.J.

Lubbock v. *Rowcroft*. (1) This was an action on a policy of insurance on goods from London to Messina; the ship arrived at Minorca and then found that Messina was in the hands of or blockaded by the French. The plaintiffs claimed for a total loss. It is to be observed that in the statement of facts it is not clear whether Messina was only blockaded by the French or was temporarily in the occupation of the French. According to the argument of Erskine as reported, he distinguished occupation from blockade and contended that the French having taken Messina was a restraint by the enemies of the country, which created an incapacity in the ship to perform the voyage intended to be guarded by the policy. Lord Ellenborough said that the abandonment of the voyage "was from an apprehension of an enemy's capture; and not from any loss within the terms of the policy," and he added that "if such was allowed, every ship about to sail from the Port of London for a port which had fallen into the hands of the French might be abandoned," just as Lord Alvanley said in *Hadkinson* v. *Robinson* (2) that if the plaintiffs had succeeded the same principle would have applied in case information had been received that the ship could not safely proceed to Naples. In reference to these cases Sir Robert Finlay called attention to the passage in the second edition of Arnould on Marine Insurance at p. 809. The learned author says: "In this country, however, it has been repeatedly decided, and must now be taken as clear insurance law, that neither interdiction of trade at the port of destination after risk commenced, nor interception of the voyage by blockade, or by the imminent and palpable danger of capture or seizure, amount to a risk for which English underwriters are answerable under the common form of policy, either as an arrest, restraint, and detention, or in any way whatever. The principle on which these decisions rest, is the maxim causa proxima non remota spectatur; the cause of loss must be a peril acting upon the subject insured, immediately and not circuitously, as is held to be the case where the loss arises from the ship's being prevented from completing her voyage by the impossibility of entering her port

(1) 5 Esp. 50. (2) 3 Bos. & P. 388.

of destination without being captured." See also Phillips on Marine Insurance, 3rd ed., vol. i., par. 1115, p. 647.

Sir Robert Finlay lays great stress not only upon the absence of judicial authority, but also upon the absence of any statement in either of these or any other text-books on marine insurance law to support the proposition affirmed by Bailhache J. Mr. Roche in answer points to *Miller* v. *Law Accident Insurance Co.* (1), and moreover comments on the absence of all authority against his contention. Certainly it is remarkable that the present should be the first case in which there is any record of the point having been taken or decided when one recalls the cases on marine insurance law which arose out of the Napoleonic and Crimean wars, but these reflections do not by themselves assist one to arrive at a conclusion. So far as they have any value they tend in my view in favour of the underwriters, as it may be said that it is inconceivable, if the assured ever thought such a loss came within the perils insured against, that there should be no record of any attempt made to enforce the claim, and equally inconceivable that the underwriters should have submitted to such a claim without a decision of the Courts to that effect. Nevertheless I think the decision of the Court of Appeal in *Miller* v. *Law Accident Insurance Co.* (1) tends distinctly in favour of the plaintiffs and the principles of law for which they are contending. The principle of *Hadkinson* v. *Robinson* (2) was again discussed in the case of *Miller* v. *Law Accident Insurance Co.* (1) It was there held that it did not apply in that case as the master went as far as he could towards the completion of the venture and only desisted when the Government intervened. That seems to me very close to the present case. Both the *Orthia* and *St. Andrew* were proceeding on the voyage and were compelled to abandon it because the Government intervened by the declaration of war. That act of the Sovereign was in itself, by the operation of the common law, a prohibition to trade with the enemy; the voyage to Germany immediately became illegal and if persisted in would doubtless have been prevented by force. Indeed, if the master had continued the voyage and loss had arisen the underwriters could

(1) [1903] 1 K. B. 712. (2) 3 Bos. & P. 388.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Lord Reading C.J.

have pleaded in answer to the claim on the policy that the loss was caused by his unlawful act. *Hadkinson* v. *Robinson* (1) differs from the present case in that the abandonment of the voyage because of the blockade, or for fear of capture, was a voluntary act of the master of the vessel. He elected not to run the risk of capture; the voyage had not become illegal. He could have proceeded on the voyage although it was fraught with danger, but he abstained from attempting to enter the blockaded port. In the present case simultaneously with the outbreak of hostilities the voyage became illegal and impossible of performance for a British subject in a British ship. The abandonment of the voyage was not a voluntary act on the master's part, there was no other course open to him in consequence of the war.

The defendants further contend that the restraint, if any, was an act of the British Executive, and that such a restraint is not covered by the policy, notwithstanding that the words are "restraints and detainments of all kings, princes, and people of what nation, condition and quality soever." It is obvious that the language of the clause embraces the authoritative acts of British as well as all other Governments, and the natural and ordinary meaning of the words must prevail unless there is some custom or usage attributing special meaning to them. No such customary meaning is even suggested. The argument is that on the ground of public policy the Court ought to read the clause as if it excepted acts of restraint by the British Government. I am at a loss to understand why an insurance against loss by acts of restraint by the British Government should necessarily be against public policy. I think the following passage in Phillips on Insurance, par. 1109, accurately expresses the law in this respect: "The policy extends to captures, arrests and detentions by public enemies, by belligerents where the property insured is neutral, or by the Government of which the assured is a subject, for any other cause than a violation of law." Lord Holt in *Green* v. *Young* (2) and Lord Alvanley in *Touteng* v. *Hubbard* (3) express opinions to this effect. Bailhache J. in his judgment closely examines the authorities, and I do not think I

(1) 3 Bos. & P. 388. (2) 2 Ld. Raym. 840.
(3) 3 Bos. & P. 291.

can usefully add anything to his observations. I agree with him that the point fails.

Lastly the defendants contend that there was no constructive total loss of the goods. The law before the passing of the Marine Insurance Act, 1906, was well established that when goods were insured to be carried to their port of destination the owner of the goods could recover as for a total loss, if it became impossible to perform the voyage, that is, if there was a destruction of the contemplated adventure by reason of a peril insured against. The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by any of the perils insured against from arriving in safety at the port of their destination: see *Roux* v. *Salvador*. (1) The total loss of the cargo may be effected by a total incapacity indefinitely prolonged in the ship to perform the voyage, for that is a loss of the voyage and therefore a destruction of the adventure: per Lord Ellenborough in *Barker* v. *Blakes* (2), and *Anderson* v. *Wallis*. (3) In *Rodocanachi* v. *Elliott* (4), in the Exchequer Chamber, Bramwell B. says: "The result of this state of things undoubtedly was that the goods were prevented from leaving Paris, and that the whole adventure was broken up, and so continued at the time when the notice of abandonment was given and up to the commencement of the action. We are of opinion that this amounts to a constructive total loss of the goods, by restraint of kings and princes within the terms of the policy. This is not a mere temporary retardation of the voyage, but the breaking up of the whole adventure. It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, 'to a destruction of the contemplated adventure.'" Has the law been changed in this respect by the Marine Insurance Act, 1906? This statute is "an Act to codify the law relating to Marine Insurance," but by s. 91, sub-s. 2, "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions

(1) 3 Bing. N. C. per Lord Abinger at p. 278.
(2) 9 East, 283.
(3) 2 M. & S. 240.
(4) L. R. 9 C. P. at p. 522.

C. A. 1915

SANDAY & CO. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Lord Reading C.J.

of this Act, shall continue to apply to contracts of marine insurance." That the language of the statute has altered the theretofore prevailing law in some respects is shown by the decisions in *Hall* v. *Hayman* (1) and *Polurrian Steamship Co.* v. *Young* (2), since affirmed by the Court of Appeal. By s. 56, sub-s. 1, "A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss." By s. 56, sub-s. 2, "A total loss may be either an actual total loss, or a constructive total loss." By s. 56, sub-s. 3, "Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss." What is an actual total loss? That is defined by s. 57, sub-s. 1: "Where the subject-matter insured is destroyed or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss." What is a constructive total loss? That is defined by s. 60, sub-s. 1: "Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred." Sub-s. 2: "In particular, there is a constructive total loss—(i.) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods as the case may be would exceed their value when recovered." In my opinion the definition is exhaustive, but it must be read, as indeed must every section of the statute, subject to s. 91, sub-s. 2. The law in my opinion before the passing of this Act was well settled that constructive total loss of the goods could be proved by establishing the destruction of the contemplated adventure. It is contended by the defendants that by this statute the Legislature has now abolished the distinction in this respect between a constructive total loss of ship and a constructive total loss of goods, and has placed both on the same basis by enacting

(1) [1912] 2 K. B. 5. (2) [1915] 1 K. B. 922.

for both ship and goods the law hitherto prevailing only in respect of the ship, and has taken away the right of the owner of goods to claim for a total loss where there is a destruction of the adventure. "There is a constructive total loss when the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable" are the words of the statute on which the decision must turn. The defendants say "subject-matter insured" is the goods and nothing but the goods, and cannot include the contemplated voyage of the goods. They point to the words of the policy: "And it is also agreed and declared that the subject-matter of this policy . . . . shall be and is as follows—Upon linseed valued at 11,000*l.*" in the case of the *Orthia*, "Upon linseed and wheat valued at 33,800*l.*" in the case of the *St. Andrew*. But it is not only the goods that are the subject-matter of the insurance, but the goods on a voyage at and from ports in the River Plate to Hamburg. The insurance on the goods is a contract by the underwriters to indemnify the assured for any loss he may sustain by the goods not arriving in safety at their destination as an immediate consequence of a peril insured against. The term "subject-matter" occurs in many of the sections, but is nowhere defined. According to the common law, which must still prevail unless inconsistent with the express provisions of the statute, the loss of the voyage was, in regard to goods, treated as a loss of the goods notwithstanding that they were in specie and even uninjured. The loss of the venture by a peril insured against was treated as conclusive evidence of the loss of the goods if the owner of the goods gave due notice of abandonment. I cannot find any provisions in the statute which are inconsistent with this rule of the common law, and I come to the conclusion that the law as it existed before the Act of 1906 has not been altered in this respect by the statute. I am therefore of opinion that there was a constructive total loss of the goods.

In my opinion the judgment of Bailhache J. is right and the appeal should be dismissed.

SWINFEN EADY L.J. read the following judgment:—In July, 1914, the plaintiffs shipped at Rosario, on the British steamship

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Swinfen Eady L.J.

Orthia, for carriage to Hamburg, certain bags of linseed, which they had contracted to sell to German merchants delivered cost, freight, and insurance Hamburg, but the property in the goods had not passed. The plaintiffs insured the goods with the defendants for the sum of 11,000*l*. A state of war existed between Germany and Great Britain at and from 11 P.M. on August 4, 1914. On August 5 the owners of the steamship cabled to St. Vincent directing the *Orthia* to proceed to Glasgow; this cablegram was sent in consequence of a suggestion by the British Admiralty that the ship should be diverted to a British port. On August 7 the *Orthia* while on the voyage to Hamburg called at St. Vincent for bunker coal, became aware of the existence of a state of war, and received the owners' cable, and accordingly proceeded to Glasgow, where she arrived on August 20, and the owners discharged her cargo. On September 7 the plaintiffs gave to the defendants notice of abandonment of the goods to them as a total loss, and on September 9 the defendants refused to accept abandonment. Bailhache J. decided that there was a loss due to a peril insured against, as its proximate cause, being covered by the words "arrests, restraints and detainments of all kings, princes and people of what nation, condition, or quality soever," and that such loss was a constructive total loss. The defendants appeal, and contend that there was not any loss due to any peril insured against and in any case that there was not a constructive total loss. The facts not being in dispute, the question is whether the occurrence of a state of war between this country and Germany, whereby the further continuance of the voyage to Hamburg of the *Orthia* became illegal, is a "restraint of kings, princes," &c., within the meaning of the policy. There was not in this case any actual interference with the ship or cargo. The owners themselves diverted the ship's course, and discharged her cargo, at Glasgow. Their possession and control of both ship and cargo were never actually disturbed. They were constrained to act as they did by the existence of the state of war; they were precluded by that alone from continuing the voyage to Hamburg, which had become illegal. Was the loss occasioned by the abandonment of the voyage, in consequence of the existence of a state of war, a loss by reason of one of the

perils insured against? Does the fact that, after the commencement of a voyage, a state of war supervened which rendered the further prosecution of the voyage illegal, and therefore impossible, amount to a "restraint of kings, princes," &c., within the meaning of those words, as used in the policy of marine insurance in question? A policy of marine insurance must be construed like other instruments, and is not subject to any peculiar rules of construction. In *Robertson* v. *French* (1) Lord Ellenborough C.J., in delivering the judgment of the Court of King's Bench, thus stated the law: "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases: it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz. that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." Bowen L.J., when citing this passage in *Hart* v. *Standard Marine Insurance Co.* (2), stated that he thought that no better exposition had been given of the broad rules of construction applicable to all commercial documents; and in the recent case in the House of Lords of *Glynn* v. *Margetson & Co.* (3) Lord Halsbury referred to this judgment as stating the law with great precision. It is therefore necessary to consider whether the abandonment of the voyage in the present case was caused by an "arrest, restraint or detainment," &c., within the plain and ordinary meaning of those words of the policy, or within some known and definite meaning which the

(1) (1803) 4 East, 130, at p. 135. (2) (1889) 22 Q. B. D. 499, at p. 501.
(3) [1893] A. C. 351, at p. 357.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Swinfen Eady L.J.

usage of trade has attached to them, some special and peculiar sense distinct from the popular sense of the words, and to which effect must be given in order to effectuate the intention of both parties to the contract, and with reference to which both parties must be presumed to have contracted. The language used in a Lloyd's policy, which was introduced into England more than three centuries ago, is often not intelligible without the aid of usage and judicial decisions. The assured in the present case has been compelled to abandon a voyage which, although lawful at its commencement, had become unlawful by the common law of the country, owing to the occurrence of a state of war. By abandoning the voyage, and altering the destination of the ship and cargo, the assured acted in obedience to the general law of the country, which forbids trading with the enemy. Although in this case he obeyed the law voluntarily, there lies behind the law the sanction of force, which compels obedience to it; but the force of any country, which compels obedience to its ordinary municipal law, is not a "restraint of kings, princes," &c., in the plain, ordinary, and popular sense of those words occurring in a marine policy to describe perils insured against. Each of the words used, "arrest," "restraint," "detainment," implies the presence of force; if not physically exerted (otherwise than by its mere presence), yet actually present, and ready to be immediately exerted, if obedience to the force is not yielded without its being exercised; as in *Rodocanachi* v. *Elliott* (1), where, although there was no actual seizure or arrest of the goods, the "city in which the goods were (Paris) was besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army." Similarly ships are "detained" by force in a blockaded port and "restrained" from coming out where the port is completely invested, and the cordon of the blockading squadron sufficient to prevent any vessel from passing through it, although no ship is seized or arrested or in the actual possession of the blockading force. Lord Stowell defined a blockade as "a sort of circumvallation round a place, by which all foreign connection and

(1) L. R. 8 C. P. 649; L. R. 9 C. P. 518.

correspondence is, as far as human force can effect it, to be entirely cut off": *The Vrouw Judith.* (1) But it is essential that this human force should be actually present. The words "arrest," "restraint," "detainment," all naturally imply the presence and exertion of force in the same sense, and I am not aware of any instance in which an event has been held by judicial decision to constitute an arrest, restraint, or detainment where no force has been used, unless it has been present, and ready to be immediately exercised, if obedience be not accorded without it being actually exerted.

In *Goss* v. *Withers* (2) Lord Mansfield laid down that by the general law the assured may abandon in the case of an arrest or an embargo by a prince not an enemy; and in *Rotch* v. *Edie* (3) that principle was applied to an embargo laid on by the Government of the country of the port of loading. But in these instances of arrest, restraint, or detainment force was present. In *Finlay* v. *Liverpool and Great Western Steamship Co.* (4) the defendants pleaded, by way of answer to a claim for not delivering goods in accordance with the bill of lading, that they were prevented by "acts or restraints of princes," an exception contained in the bill of lading, and then set out in the plea that they had been sued in New York by the true owner of the goods, and had been ordered by a Court of competent jurisdiction to give up the goods to him. This was adjudged a bad plea. Martin B. said: "The 'acts and restraints of princes and rulers' mentioned and provided against in the bill of lading, have reference to the forcible interference of a State or of the Government of a country taking possession of the goods manu forti, and do not extend to the legal proceedings which, it is alleged in the plea, afterwards took place in the Courts at New York." In *Rodocanachi* v. *Elliott* (5) (to which I have already referred) goods in transit from Marseilles to London had to pass through Paris, and on their way they came within the lines of the German army, by which Paris was then completely invested. This was held to constitute a restraint of princes. Bramwell B., in delivering the judgment of the

(1) (1799) 1 C. Rob. 150.
(2) (1758) 2 Burr. 683, at p. 696.
(3) (1795) 6 T. R. 413.
(4) 23 L. T. 251.
(5) L. R. 8 C. P. 649; L. R. 9 C. P. 518.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Swinfen Eady L.J.

Exchequer Chamber, in the passage from which I have already quoted, says: "But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no specific action on the goods themselves. It is true that there was no actual seizure or arrest of the goods, nor was there any specific or published order prohibiting the transport of goods from the besieged city; but the city in which the goods were was besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army." This shows that the Court was of opinion that the goods were, for all effective purposes, seized by the German army, and taken out of the control and disposition of the owners; they were in an area enclosed by German soldiers and by them physically prevented from leaving that area. It was by the forcible and therefore by the violent act of the German army that the goods were prevented from reaching their destination. No other view of the facts in that case could have been taken, and having regard to that view, no other conclusion could be arrived at than that the plaintiffs had lost their goods by a restraint of princes. See per Bigham J. in *Miller* v. *Law Accident Insurance Co.* (1) In that case it was decided by Bigham J. as a judge of first instance that the mere operation of an ordinary municipal law affecting or preventing the delivery of the insured goods at their destination is not a "restraint of princes or people" within the meaning of a Lloyd's policy of marine insurance, that the words of the policy do not cover the operation of the ordinary law of the land, but relate only to some violent departure from the ordinary course of things. On appeal (2) the Court took a different view, and upon the facts held that what had actually taken place did amount to a "restraint of princes," Stirling L.J. (at p. 719) stating that on the day following the arrival of the steamer *Bellevue* at Buenos Aires there was a decree of the President, which stated the arrival of cattle by that steamer, and decreed that the discharge of all cattle from the United Kingdom was stopped until further notice. "The captain accordingly took the ship outside the port, and with the view to minimize the loss, transhipped the

(1) [1902] 2 K. B. at pp. 699, 700. (2) [1903] 1 K. B. 712.

cattle into another vessel, and they were carried to Monte Video and there sold at a great loss. It seems to me that there was an active intervention of the Government of the Argentine Republic, which was none the less an exercise of superior force because no officer of the army or of the police force intervened." And Mathew L.J. said: "If actual force was not used it was because there was no opposition. The master submitted to the orders of the administration." The case was thus dealt with as one of active intervention and restraint by a foreign Government under a special decree made after the arrival of the vessel in the port, the Government having there available the force to compel obedience to its orders, if necessary. Stirling L.J. points out that if the master, when about to enter the port, had been informed of the existence of a law restricting the right to land cattle and that the Government were likely to put that law into force, and he had then gone on his voyage and not entered the port, the case would have been like *Hadkinson* v. *Robinson* (1) and similar authorities. That is to say, if the proceedings of the Government had been the same, but the shipowner had acted differently, and not entered the port, there would have been no loss within the meaning of the policy. In *Hadkinson* v. *Robinson* (1) the insurance was on a cargo of pilchards at and from Mounts Bay to Naples. The vessel sailed under convoy. In the course of the voyage the master received notice that the port of Naples was absolutely closed to British ships by the Government in the kingdom of Naples, and she put into Minorca, by order of the commodore of the convoy, where the cargo was sold. The merchant gave notice of abandonment, and claimed for a constructive total loss. It was argued on his behalf that it was impossible to contend that the ship was not as much prevented from proceeding to Naples by "the restraint of princes" as if she had been actually detained by the Government of an intermediate port, since she could not sail into Naples without rendering herself liable to immediate confiscation. The judgment of the Court of Common Pleas was delivered by Lord Alvanley C.J., who said: "I think that the detention of the cargo on board the ship at a neutral port in consequence of the

(1) 3 Bos. & P. 388.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Swinfen Eady L.J.

danger of entering the port of destination cannot create a total loss within the meaning of the policy, because it does not arise from a peril insured against. This is an insurance upon an article from England and Naples, warranted free from particular average. The plaintiff therefore cannot recover, unless the article be totally lost by a peril within the policy; and such peril must, as I think, act directly and not collaterally upon the thing insured." *Lubbock* v. *Rowcroft* (1) was an action on a policy on goods London to Naples, Leghorn or Messina, with liberty to touch at Gibraltar or any other port in the Mediterranean. When the ship arrived at Minorca it was found that Messina was in the hands of the French, and the merchant gave notice of abandonment and claimed as for a total loss. It was urged on his behalf that it was not merely a case of great probability of the ship being captured, but that the port was in possession of the enemy so that her capture was certain. Lord Ellenborough, however, said "that he still retained his first opinion, that the abandonment was from an apprehension of an enemy's capture; and not from any loss within the terms of the policy. That if such was allowed, every ship about to sail from the port of London for a port which had fallen into the hands of the French might be abandoned." The case afterwards went off on other grounds, but it shows that in the opinion of Lord Ellenborough if during the course of a voyage the port of destination became the port of an enemy the cargo did not thereupon become a constructive total loss. That indeed is the present case. It is conceded that there is not any reported case, down to the present time, in which it has ever been determined that the mere occurrence of a state of war, rendering the further prosecution of a voyage to an enemy port illegal, and of which the master of the ship has notice, of itself occasions a loss by restraint of kings, princes, &c., although this is an event which in the course of English history must have happened many times. Nor is there any statement in any text-book of authority that such an occurrence is deemed to occasion a loss, as a restraint of kings, princes, &c., by the general usage or custom of merchants and underwriters. In my opinion

(1) 5 Esp. 50.

the outbreak of war, whereby the further continuance of a voyage to a port, which has become an enemy port, has become impossible, is not an arrest, restraint, or detainment, either within the ordinary meaning of those words or within any meaning which the custom of merchants or the usages of trade have affixed to those words when used in a policy of marine insurance.

If a contrary view were to prevail the further point would arise whether the assured could claim for a constructive total loss, although the actual possession and control of both ship and goods have not in any way been interfered with. What is a "constructive total loss" is defined by the Marine Insurance Act, 1906. By s. 91, sub-s. 2, the rules of the common law, including the law merchant, are to continue to apply to contracts of marine insurance, save in so far as they are inconsistent with the express provisions of the Act. There is, however, an express provision in s. 56, sub-s. 1, that "any loss other than a total loss, as hereinafter defined, is a partial loss." The definition of a total loss is therefore exhaustive, and any loss not coming within that definition is expressly declared to be a partial loss. The judge below proceeded on the ground that in the case of a marine policy on goods the insurance is on the venture, and the loss of the venture constitutes a constructive total loss of the goods. He added that this is not one of the instances of constructive total loss given in the Marine Insurance Act, 1906, but he thought that it was still the law, and that the point was covered by *Rodocanachi* v. *Elliott*. (1) The learned judge thus considers what the law was, apart from the Act, and decides that the Act has not altered the law in this respect. But this is not the true point of view from which to approach the construction of the statute. The canon of construction applicable to a codifying Act has been in several cases laid down in the following manner: "The proper course is in the first instance to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably

(1) L. R. 9 C. P. 518.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Swinfen Eady L.J.

intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view": *Bank of England* v. *Vagliano Brothers* (1); *Robinson* v. *Canadian Pacific Ry. Co.* (2); *Bristol Tramways Co.* v. *Fiat Motors, Ld.* (3) Now to apply this canon of construction to the statute. By s. 56, sub-s. 1, a loss is a partial loss unless it is a total loss "as hereinafter defined." By s. 56, sub-s. 2, "A total loss may be either an actual loss or a constructive loss." By s. 57, sub-s. 1, there is an actual total loss "where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof." It is not suggested in the present case that there was any actual total loss. By s. 60 constructive total loss is defined. "There is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable." What is the "subject-matter insured" in the present case? The policy says "that the subject-matter of this policy . . . . is . . . . upon linseed valued at 11,000*l*." The linseed was not destroyed or damaged, nor was the assured irretrievably deprived of it, nor was it abandoned on account of its actual total loss appearing to be unavoidable. I agree with Bailhache J. that there was not any constructive total loss as defined by the Act, but as in my opinion that definition is exhaustive, there was not any constructive total loss. It was contended that the subject-matter of the insurance was not the linseed, but the venture, and that the loss of the venture constituted a constructive total loss of the goods. But if "the subject-matter insured" was the venture, there was an actual total loss as defined by s. 57, sub-s. 1, because s. 57, sub-s. 1, says: "Where the subject-matter insured"—I treat that as the venture—"is destroyed or so damaged," and so on, "there is an actual total loss." By s. 23 of the Act, "A marine policy must specify" (inter alia) "(2.) The subject-matter insured and the risk insured against: (3.) The voyage, or period of time, or both as the case may be, covered by the insurance." Many other sections of the Act might be referred to, including s. 60, sub-s. 2, as

(1) [1891] A. C. 107, per Lord Herschell at p. 144.

(2) [1892] A. C. 481.

(3) [1910] 2 K. B. 831, at p. 836.

showing that where there is an insurance on goods (as in the present case) the subject-matter mentioned in s. 60, sub-s. 1, means, as I hold that it does mean, the goods insured. It was urged that if this construction be right, the Act has altered the law on this point. This may be, but it is the duty of the Court to give effect to plain and unambiguous language, notwithstanding that it may have altered the previous law. The statute has already been held to have altered the previous law, in favour of underwriters, in other respects. See *Hall* v. *Hayman* (1); *Polurrian Steamship Co.* v. *Young*. (2)

It follows that on both points the appellants are entitled in my opinion to succeed. Thus far I have dealt only with the steamship *Orthia*.

The steamship *St. Andrew* sailed from the River Plate with a cargo, mostly of wheat, for Hamburg, the property not having passed to the intended German buyers. On August 9, when approaching the Lizard, she was stopped and interrogated by a French cruiser. The cruiser signalled: "For security, go into Port Liverpool"; there was some error in the signal letters, as Port Liverpool is in Canada; the cruiser was told of the error, and then signalled: "Go into Falmouth, English Channel." On arriving at Falmouth, if not before, the captain learnt of the war between this country and Germany, and thus knew that the further prosecution of the voyage to Hamburg had become impossible. He was then instructed, through the examining officer at Falmouth, by the chief naval transport officer at Devonport to proceed to Liverpool, where the cargo was discharged. These circumstances do not enable me to draw any distinction between the two ships. The communication by the French cruiser was only a friendly act, a message for the ship's own protection, "for security," as the cruiser's captain said. That was not a hostile act, and was not an arrest, restraint, or detainment. On arrival of the ship at Falmouth, the voyage was no longer possible, and any instructions given by the transport officer did not affect that question. Liverpool was probably a much more convenient port of discharge than Falmouth.

The result is that the decision in the case of the steamship

(1) [1912] 2 K. B. 5. (2) [1915] 1 K. B. 922.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

St. Andrew must be the same as in that of the steamship *Orthia*.

In my judgment the appeal should be allowed.

BRAY J. read the following judgment:—I should have been prepared to adopt the judgment of the Lord Chief Justice, but as I had already written my own judgment I will read it. In this case the defendants appeal from the judgment of Bailhache J., who held that the plaintiffs were entitled to recover the full amount payable by the defendants under two policies of insurance, one in respect of a parcel of linseed and a parcel of wheat on board the steamship *St. Andrew*, and another in respect of a parcel of linseed on board the steamship *Orthia*, in each case as for a constructive total loss. The facts were not in dispute and may be shortly stated thus: The plaintiffs are merchants in England and British subjects. They shipped in July, 1914, on board the *St. Andrew*, a British ship, at two ports in South America the parcel of linseed and the parcel of wheat under bills of lading dated July 3, 6, and 11 for carriage to Hamburg. The linseed had been sold by the plaintiffs to German merchants, but the property had not passed, and they intended to sell the wheat in Germany. In the same month by bills of lading dated July 1 they had shipped at a port in South America the second parcel of linseed on board the *Orthia*, also a British ship, for carriage to Hamburg. This linseed had also been sold to German merchants, but the property had not passed. The parcels by the *St. Andrew* and the parcel by the *Orthia* had been insured with the defendants by two separate policies, each dated July 31. The perils insured against included "takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever," and on payment of an extra premium the usual f. c. and s. clause was deleted. In both cases they were free of particular average except in circumstances which did not arise, and the voyage was "at and from port or ports in River Plate to Hamburg with leave to call for orders at Las Palmas and/or St. Vincent and/or" elsewhere. War was declared by the British Government against Germany on August 4, and on August 5 the Proclamation forbidding commercial intercourse

with the enemy was published. On August 9, as the *St. Andrew* was approaching the Lizard she received a signal from a French cruiser to stop instantly. She stopped and the cruiser came alongside and signalled to her to go into Falmouth, English Channel, emphasizing such signal. In consequence of this she proceeded to Falmouth, where the captain was informed that there was war between England and Germany, and received orders through the "examining officer" from the chief naval transport officer at Devonport to proceed to Liverpool. In consequence of these orders she proceeded to Liverpool and there discharged the linseed and the wheat. But for the signals from the French cruiser the captain would have stopped at the next signal station and communicated with his owners, but if the weather had been foggy he would have proceeded direct to Hamburg. On calling at Las Palmas on his way to the Lizard the captain had learnt that there was war between France and Germany but not that there was war between England and Germany. As regards the *Orthia* her owners on August 3 received a telegram from the Admiralty in these words: "Admiralty suggest in the interests of the nation that your *Orthia* now bound for Hamburg with grain be diverted to a British port. Any further information is available at Trade Branch, War Staff, Admiralty." On August 5 the owners, having become aware of the declaration of war and the Proclamation, sent a cable to St. Vincent, which the captain received on the 7th, directing the *Orthia* to proceed to Glasgow, and in consequence the *Orthia* proceeded to Glasgow and there discharged. The linseed in each case depreciated to the extent of some 25 per cent. Due notice of abandonment was given to the defendants in each case but was declined. The action was tried before Bailhache J. without a jury with the result I have already mentioned. The points raised by the defendants on the appeal were these: (1.) That a declaration of war by the British Government with its consequence, namely, that the further prosecution of the voyage became illegal, was not a restraint of princes. (2.) That a restraint by the British Government, the owners of the goods and the ships being British subjects and the underwriters also, must be taken to be excepted from the perils

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Bray J.

insured against. (3.) That the restraint, if any, was not the proximate cause of the loss. (4.) That there was no constructive total loss. The first point seems to me to be a very important and very difficult point. It may be divided into two heads: (*a*) That there was no political or executive act, and that it was merely the bringing into operation of the ordinary law. (*b*) That a restraint of princes must be by force, and there was no force. As to (*a*) the 10th rule in the schedule to the Marine Insurance Act is this: "The term 'arrests &c. of kings, princes, and people' refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process." A clear distinction is thus drawn between restraints caused by political or executive acts and a restraint caused by ordinary judicial process. Which is this? The restraint here is caused and brought into operation by the declaration of war. I think it is clear that a declaration of war is an act of State, a political act. In *Esposito* v. *Bowden* (1) Willes J. said: "The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an act of State, done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law." It is not true in my opinion to say that the restraint which forbids intercourse with the enemy is "ordinary judicial process." It is to be observed that the 10th rule does not use the words "ordinary law." It speaks of "ordinary judicial process," meaning the act of an ordinary Court of justice in relation to the goods. This is in accordance with and is no doubt based on the judgment in *Finlay* v. *Liverpool and Great Western Steamship Co.* (2) There is no ordinary judicial process here, or any process, nor could there be except in the event of the ship being brought into port by a British cruiser and the goods condemned in a Prize Court. But even then I do not think the powers of a Prize Court could be said to be "ordinary judicial process." The restraint which forbids intercourse with the enemy is neither judicial process nor ordinary judicial process. Ordinary judicial process and ordinary law involve no fortuitous act or event. A declaration

(1) 7 E. & B. at p. 781. (2) 23 L. T. 251.

of war does. It is not an ordinary event. It is exceptional and fortuitous. There is a violent departure from the ordinary course of events. It was asked what if there be no declaration of war, but a state of war without a declaration? There is still a political act. A state of war cannot exist without the act of the State either in commencing hostilities or in using the naval or military forces to resist acts of violence committed by the enemy. The above reasoning, however, only gets rid of the exception. It remains to be considered whether there is a restraint. I do not think there is to be found anywhere an exhaustive definition of this word, though there are cases where certain acts have been decided to constitute a restraint, and other cases where acts have been held not to constitute a restraint. The word "restraint" appears in charterparties and bills of lading as well as in policies of marine insurance, and it has been held to have the same meaning in all these documents. The decided cases are of course a help in arriving at the meaning of this word, but there is nothing in them to prevent one giving the ordinary meaning to this word. Now "restraint" is a word more properly applicable to persons than to goods. Lord Bramwell so held in giving the considered judgment of the Court in *Rodocanachi* v. *Elliott* (1), where he said: "And as a verbal matter we may observe that 'restraint' is a word more properly applicable to persons than to goods, so that a restraint of goods means a restraint of those having the custody of goods." The word is used in the same way every day in these Courts. An injunction is granted "restraining" the defendant from doing certain acts. This is of some importance because the effect of the declaration of war is to restrain persons, in this case the owners of the ships and the owners of the goods, from prosecuting the voyage to Hamburg. It restrains and destroys the adventure. And it is a restraint of princes because it is a restraint imposed by or consequent upon an act of State. Restraint does not necessarily involve any actual seizure, nor actual physical force. This is clearly decided in charterparty and bills of lading cases. In Arnould on Marine Insurance,

(1) L. R. 9 C. P. at p. 523.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Bray J.

9th ed., s. 832, it is said: "A 'restraint' does not necessarily involve the use of actual physical force; an authoritative prohibition on the part of the governing power is sufficient." Reference is made to *Miller* v. *Law Accident Insurance Co.* (1), which I shall deal with presently. The charterparty cases are *Geipel* v. *Smith* (2) and *Nobel's Explosives Co.* v. *Jenkins.* (3) In the latter case, on p. 331, we find this passage: "It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel* v. *Smith* (2) and *Rodocanachi* v. *Elliott.*" (4) I will deal with this further when I come to (*b*). It is to be observed further that the ordinary Lloyd's policy now contains, and has for some years contained, what is called the "f. c. and s. clause," which uses the words "and all consequences of hostilities or warlike operations whether before or after declaration of war." This affords some indication that but for these perils being excepted by this clause they would fall within the perils insured against. I do not place much reliance on this, but so far as it goes it throws some light not only on the words "restraint of princes," but on the very general and comprehensive words which follow. These general words are not without importance: see the judgment of Mathew L.J. in *Miller* v. *Law Accident Insurance Co.* (1) The defendants strongly relied on the fact that no such case as the present could be found in any of the decided cases. That is true, but on the other hand there is no suggestion to be found in the text-books that such a case is not covered by the words "restraint of princes," and the definition of those words in the 10th rule in the schedule to the Marine Insurance Act does not exclude it unless it falls within the words "ordinary judicial process," which, in the opinion I have already expressed, do not include it. It is not unfair to look at it from the view of the ordinary business man, whether the owner of goods or the underwriter. Who would say that the owner of the goods was restrained from prosecuting this voyage by the operation of the ordinary law? The owner of the goods would

(1) [1903] 1 K. B. 712.
(2) L. R. 7 Q. B. 404.
(3) [1896] 2 Q. B. 326.
(4) L. R. 9 C. P. 518, at p. 523.

say "What did I pay the extra premium for? Was it not that I might be insured against all the perils excepted by the clause which I stipulated should be deleted? I anticipated a declaration of war and hostilities, and I wanted to be protected against the consequences of hostilities and this is one of the consequences, so I had the f. c. and s. clause struck out." It is the absence of authority alone that makes me hesitate, but that in my opinion is not sufficient reason to justify me in refusing to construe the words "restraint of princes" in their ordinary signification, and, so read, I cannot hold that the restraint put upon the plaintiffs, which prevented them from prosecuting the voyage, is other than a restraint of princes.

I must, however, deal with the other contentions. I come therefore to point (*b*), that a restraint of princes must be a restraint by force. I have already dealt partly with this point. Much reliance was placed on what was said by Martin B. in *Finlay* v. *Liverpool and Great Western Steamship Co.* (1) At most that was a dictum, and I think it is disposed of by what Mathew L.J. said in *Miller* v. *Law Accident Insurance Co.* (2) in his considered judgment. He said: "The words, it was contended, implied the use of direct force, and none had been employed. The case of *Finlay* v. *Liverpool and Great Western Steamship Co.* (1), upon which reliance was placed by the defendants' counsel, affords no ground for this position, and no other satisfactory authority was referred to." Probably it may be necessary that the restraint should be capable of being enforced by force if necessary, but that consideration is fulfilled here, because if the owner or master had persisted in prosecuting the voyage, not only could the ship and goods have been confiscated, but the owner or master could have been prosecuted and sent to prison. In my opinion the proposition contended for by the defendants that restraint must be by force, that is to say by direct force, is not established. It would certainly lead to a curious result here, because if the master had not submitted, but insisted upon the prosecution of the voyage, and the goods had been confiscated, the defendants could have contended, and in my opinion rightly contended, that the loss was caused by the

(1) 23 L. T. 251. (2) [1903] 1 K. B. at p. 721.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Bray J.

illegal act of the master or owner. As regards the facts on this point I think in the case of the *St. Andrew* there was some force. I think it is to be inferred from the evidence that if the captain had not submitted to the orders of the French cruiser and the naval transport officer actual force would have been exercised. In the case of the *Orthia* I do not think it can be said that any actual force was exercised, because the owners submitted, as they were bound to submit, to the law brought into operation by the declaration of war, but as I have expressed the opinion that force is not necessary I draw no distinction between the two cases. I see nothing in this contention to make me alter my opinion that there was a restraint of princes.

I come now to the second point, that a restraint by the British Government is excepted. The words of the policy are "of all kings, princes and people of what nation, condition, or quality soever." Why are these words to be limited? If the particular insurance is against the public policy of this country it is illegal and therefore not enforceable, not because there is a limitation to the words but because it is illegal. There is very little if any authority upon the point. What there is seems to me to be against the defendants' contention, but this point and the authorities on it are so clearly examined and dealt with by Bailhache J. that it is sufficient for me to say that I agree entirely with his decision upon the point and the reasons he gives.

The next point is that if there was a restraint it was not the proximate cause of the loss. No doubt the plaintiffs have to show that it was the proximate cause. In support of their contention the defendants relied on a line of cases of which *Hadkinson* v. *Robinson* (1) is a type. In that case Lord Alvanley C.J. said: "But it has appeared to me that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enters the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured. . . . . The plaintiff therefore cannot recover unless the article be totally

(1) 3 Bos. & P. 388.

lost by a peril within the policy, and such peril must, as I think, *act directly and not collaterally* upon the thing insured." I think this and the other cases are clearly distinguishable. The existence of a blockade does not make the continuation of the voyage illegal. The blockade may not be in force when the vessel arrives at the port, or it may be so ineffective as not to prevent a prudent captain from trying to enter the port. He is not breaking any law of his country in running the blockade. Here the restraint acted directly upon the owner the moment war had been declared. From that moment it was illegal for him to prosecute the voyage at all. It acted directly and not collaterally. I think the defendants' contention on this point also fails.

I will now deal with the last question, whether, if there be a loss from the perils insured against, there is a constructive total loss. This question divides itself into two: (*a*) Whether there would be a constructive total loss according to the law prevailing before the passing of the Marine Insurance Act, 1906; (*b*) whether that law has been altered by that Act. The answer to the first seems to me to be quite clear. When war was declared it became illegal both for the cargo owner and the shipowner to prosecute the voyage to Hamburg. The arrival of the goods at Hamburg was postponed for a considerable and indefinite time. It was not a mere temporary retardation of the voyage. In my opinion the authorities up to the passing of the Marine Insurance Act show that in that case if due notice of abandonment be given the loss of the voyage constitutes a constructive total loss of the goods. It is unnecessary to refer to many of the authorities. In *Barker* v. *Blakes* (1) Lord Ellenborough laid down the law thus: "In order to entitle himself to recover as for a total loss the plaintiff must establish two things: First, that a loss of the voyage (the only description of loss which can be contended for in this case, as the goods themselves have been ordered to be restored and are capable of being so) was occasioned by the detention in question. . . . . And thinking, as we do, that the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged

(1) 9 East, 283, at p. 293.

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Bray J.

detention of the ship and cargo, may be properly considered as a loss of the voyage; and such loss of voyage, upon received principles of insurance law, as a total loss of the goods which were to have been transported in the course of such voyage; provided such loss had been followed by a sufficiently prompt and immediate notice of abandonment." In *Anderson* v. *Wallis* (1) Lord Ellenborough said: "In like manner a total loss of cargo may be effected not merely by the destruction of that cargo, but by a total permanent incapacity of the ship to perform the voyage. That is a destruction of the contemplated adventure." In *Rodocanachi* v. *Elliott* (in the Court below) (2) Grove J. says: "What greater loss can an assured sustain than the detention of the thing insured for a considerable and indefinite time by a hostile power?" And in the Exchequer Chamber (3) Lord Bramwell, then Bramwell B., in a considered judgment of the Court of five judges, says: "It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, *to a destruction of the contemplated adventure.*" In that case it appeared that the goods did ultimately and within six months arrive at their destination, and the purchaser accepted them and gave the full contract price, but it was held nevertheless that there had been a constructive total loss, and the plaintiffs recovered on the footing that the loss was 15,000*l.*, the amount at which the goods were valued in the policy, although the price paid by the purchaser at their destination was under 10,000*l.* In Arnould on Marine Insurance, in the 1914 edition, after stating the law as laid down by Lord Ellenborough (see art. 1142), the author, in art. 1151, says "So far the law may be considered as established." It appears therefore from the authorities I have quoted that according to the law merchant prevailing before the Act of 1906 if there was a loss the loss was a constructive total loss.

I now come to the consideration of the second question (*b*). Has that law been altered? Sect. 91, sub-s. 2, of the Act provides that "the rules of the common law, including the law

(1) 2 M. & S. 240.

(2) L. R. 8 C. P. 649, at p. 671.

(3) L. R. 9 C. P. 518.

merchant, save in so far as they are inconsistent with the *express* provisions of this Act, shall continue to apply to contracts of marine insurance." Are the express provisions of the Act inconsistent with the law merchant so established? It seems almost impossible to suppose that it could have been intended to alter the law merchant on such a vital point of marine insurance when that law had been established for over a hundred years. Still we have to look at the Act, and if there be an express provision in clear and unambiguous terms altering that law effect must be given to it, but it must be an express provision which is inconsistent with the law merchant. Sect. 56, sub-s. 1, provides that "Any loss other than a total loss, as hereinafter defined, is a partial loss"; and sub-s. 2, "A total loss may be either an actual total loss, or a constructive total loss." Then s. 60 defines what is to be considered a constructive total loss, and it must, I think, be taken as giving an exhaustive definition of a constructive total loss. If the present case does not fall within that definition I think it must be taken that the law has been altered. The words relied on by the plaintiffs are in sub-s. 1 of s. 60: "Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable." That makes it necessary to see what is the "subject-matter" and what is an "actual total loss." Actual total loss is defined in s. 57, sub-s. 1: "Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss." Having regard to the words in s. 56, sub-s. 1, "total loss as hereinafter defined," I think this must also be treated as an exhaustive definition. This brings us again to the consideration of the words "subject-matter insured." Now there is no express provision in the Act defining "subject-matter." It is referred to in many sections of the Act. Sect. 26 is perhaps the most important section to be considered, but that certainly contains no definition, and it contains no express provision inconsistent with the law as laid down by Lord Ellenborough, that a loss of the

C. A. 1915

SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Bray J.

voyage upon received principles of law is considered as a total loss of the goods which were to have been transported in the course of such voyage, or, as he put it, a destruction of the contemplated adventure. The subject-matter insured according to s. 5 may be an adventure or property. It is not true that in a policy of this kind the goods only are insured. Their safe transportation to and arrival at the port of destination is also insured. It was argued that in this policy the subject-matter was stated to be goods. That is the common form and apparently was the form of the policy in *Rodocanachi* v. *Elliott* (1), and yet it was held that it was an insurance of the venture. The word "subject-matter" occurs in many sections of the Act. It may be that in some the word is used as representing the property, but if it was intended in s. 57 that subject-matter should mean property and property only, why was not that word used? Two cases were referred to where the Court held that the law was altered by the Act, *Hall* v. *Hayman* (2) and *Polurrian Steamship Co.* v. *Young* (3); but in both those cases the Court relied on an express provision in the Act which they held to be clear and unambiguous. On the whole, after a careful consideration of the Act I cannot come to the conclusion that there is any express provision inconsistent with the law on this point as it existed before the Act. I have dealt with this point by ascertaining first what was the law before the Act, but I should have arrived at the same conclusion if I had considered the construction of the Act first. The subject-matter in my opinion in this policy was not the goods only, but the whole venture, and the whole venture was destroyed. In my opinion, therefore, all the defendants' contentions fail and the appeal must be dismissed.

Appeal dismissed.

Solicitors for defendants: *Waltons & Co.*

Solicitors for plaintiffs: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

(1) L. R. 9 C. P. 518. (2) [1912] 2 K. B. 5.

(3) 19 Com. Cas. 143.

J. F. C.

END OF VOL. II.